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No. 75-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

and

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Chamber of Commerce of the United States of America ("the Chamber"), on behalf of itself and its member Dow Chemical Company ("Dow"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

ORDERS AND OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. 1a-6a) [1] is not yet officially reported. The discovery order of the district court (Pet. App. pp. 7a-8a) is likewise unreported.

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[1] "Pet. App." refers to the appendices attached to the instant "Dow" petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. p. 9a) was entered on July 1, 1975. On August 21, 1975, the court of appeals denied the Chamber's timely petition for rehearing (Pet. App. p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether any membership association can be required, consistent with the First Amendment right of freedom of association, to disclose the identities of its injured members through a discovery order as a condition to engaging in civil litigation on behalf of its members where standing requires the association to plead the injury of at least one of its members.

2. Whether an immediate appeal of a pretrial discovery order is appropriate under 28 U.S.C. § 1291 as an important question where the order infringes upon the rights of all membership associations to initiate litigation on behalf of their injured members.

3. Whether a writ of mandamus should lie where a pre-trial discovery order violates freedom of association rights and the protective provision is inadequate to protect against widespread dissemination.

STATUTES AND RULES INVOLVED

The relevant provisions of the United States Constitution, the United States Code 28 U.S.C. § 1291 and 28 U.S.C. 1651(a) and Rule 37(b) of the Federal Rules of Civil Procedure are set forth below:

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 37(b) Failure to comply with order.

> (2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or

defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination. . . .

STATEMENT

A. The Order of the District Court

The order of which review is sought arises from an action in which the Chamber,[2] as a plaintiff, has challenged the payment by the State of Michigan, through its Employment Security Commission ("MESC"),[3] of employment compensation benefits to striking employees. On July 25, 1972, the Chamber, together with and on behalf of one of its injured members, Dow,[4] filed a complaint for declaratory judgment and injunction to enjoin and nullify the Michigan Employment Security Act insofar as that statute authorizes the payment of unemployment benefits to striking employees (Pet. App. pp. 18a-19a).[5] The complaint alleged that such state payments to strikers contravene federal labor policy by disrupting the congressionally established scheme of free collective bargaining and, thereby violate the Supremacy Clause of Article VI, Clause 2 of the Constitution of the United States (Pet. App. p. 17a).

During the course of pre-trial discovery, the Steelworkers[6] served upon the Chamber a set of twenty-two interrogatories (Pet. App. pp. 23a-33a). The interrogatory at issue here requested the Chamber to identify all its members subject to the Michigan Employment Security Act since January 1, 1968 (Pet. App. p. 23a).

On June 27, 1974, the district court over the objections of the Chamber, issued its Memorandum Opinion requiring the Chamber to disclose the identity of its members subject to MESA (Pet. App. pp.

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[2] The Chamber is an association consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. A number of the Chamber's members are employers subject to the Michigan Employment Security Act, 12 M.S.A. § 17,501 *et seq.* ("MESA") which requires them to make contributions to the Michigan Employment Security Commission, and are, as well, subject to the Labor Management Relations Act of 1947, as amended, 49 U.S.C. §151 *et seq.* ("LMRA") whereunder they are obligated to bargain collectively with the bargaining representatives of their employees.

[3] The Michigan Employment Security Commission is charged with the enforcement, operation and execution of MESA and has applied MESA so as to provide unemployment benefits to striking employees and to charge such benefits against the employers involved.

[4] Dow is an employer subject to MESA and is, therefore, required to make contributions to MESC. Dow is also subject to the LMRA and is required to bargain collectively with the bargaining representative of its employees.

[5] Such benefits had in fact been paid at various times to striking employees of Dow during the course of strikes by the Steelworkers at Dow's Midland and Bay City, Michigan facilities.

[6] The Steelworkers were granted leave to intervene on September 5, 1972. The Steelworkers are the certified bargaining representative of the striking employees of Dow.

34a-38a).[7] The district court rejected the Chamber's assertion of constitutional privilege, because in its view the Chamber had not "clearly documented" the harm to its members which would result once the Steelworkers obtained the requested information. The district court further ruled that the names of the Chamber's Michigan members were relevant to this action and necessity for the Steelworkers defense (Pet. App. p. 36a). The court also concluded that, in bringing this action, the Chamber waived any constitutional privilege against disclosure of its members' identities which it may have enjoyed (Pet. App. p. 37a). On October 4, 1974, the district court issued an order compelling the Chamber to furnish the Steelworkers with a list of its Michigan members subject to MESA within 30 days (Pet. App. pp. 7a-8a). The court issued a protective order which provides (Pet. App. p. 8a):

> Defendant-intervenor United Steelworkers of America, AFL-CIO-CLC shall not make use of the list of member business firms which plaintiff The Chamber of Commerce of the United States of America must provide in its answer to Interrogatory No. 1 of the Revised Amended Interrogatories or disclose the identity of such member business firms except to defendant-intervenor United Steelworkers of America, AFL-CIO-CLC's employees and then only when necessary to prepare for and assist in the defense of this action.

On October 18, 1974, the Chamber moved the district court to reconsider its October 4, 1974 Order

[7] In addition, the district court held that the Chamber must respond to certain other Interrogatories. In accordance with that holding and the district court's subsequent October 4, 1974 order, the Chamber timely answered the Steelworkers' revised and amended Interrogatories.

and submitted comprehensive documentary evidence of the irreparable injury which disclosure would cause. This motion was denied on October 29, 1974 (Pet. App. p. 43a). Thereafter, the Chamber moved the district court to amend its October 4, 1974 Order to permit an immediate appeal pursuant to 28 U.S.C. § 1292(b) (Pet. App. pp. 44a-48a.) The motion was denied by order dated November 6, 1974 (Pet. App. p. 49a). On November 4, 1974, the Chamber filed a notice of appeal from the district court's discovery order (Pet. App. p. 50a), and on November 6, 1974, the district court stayed its order pending appellate review (Pet. App. p. 49a).

B. The Decision of the Court of Appeals

The court of appeals concluded it had no jurisdiction under 28 U.S.C. § 1291 to hear an appeal of a discovery order, and suggested that the Chamber "can obtain effective review . . . by failing to comply with the order and perfecting an appeal should the district court impose [contempt] sanctions under Rule 37(b) F.R.C.P." (Pet. App. p. 5a). With respect to the Chamber's reliance upon the All Writs Act (28 U.S.C. § 1651(a)) as a basis for jurisdiction, the court ruled that the Chamber "failed to meet its burden of showing extraordinary circumstances which would entitle it to [a writ of] mandamus". (Pet. App. p. 6a).

REASONS FOR GRANTING THE WRIT

I. The Court Must Resolve The Dilemma Which The District Court's Discovery Order Places All Associations Who Engage In Litigation On Behalf Of Their Members.

A writ of certiorari is warranted to decide whether an association must forfeit the First Amendment rights

of its members to support anonomously association litigation whenever the association institutes litigation on behalf of its injured but unidentified members. To institute litigation an association must allege injury to itself or at least one of its members. *Warth* v. *Seldin,* — U.S. —, 95 S.Ct. 2197, 2213 (1975); *Sierra Club* v. *Morton,* 405 U.S. 727, 735 (1972); *NAACP* v. *Alabama,* 357 U.S. 449, 458-60 (1958). Here, the Chamber alleged the injury of its member Dow and that of its other Michigan members who subsidize Michigan's payments to striking employees (Pet. App. p. 13a). The district court held that by pleading the injury of these Michigan members, the Chamber waived any First Amendment privilege which might bar disclosure. This ruling constitutes a substantial abridgement of the rights of all associations to engage in interest litigation on behalf of their anonmous members. All membership associations are now required to choose between disclosing the identities of their members in order to establish standing or forego entirely initiating any litigation. This imposed choice between litigation or membership anonymity restrains fundamental freedom of association rights and conflicts with the rulings of this Court.

The Court has consistently recognized that the right of freedom of association guaranteed by the First Amendment protects the anonymity of persons who associate together to advance common interests or common causes which they espouse. *NAACP* v. *Alabama, supra,* 357 U..S at 462; *Gibson* v. *The Florida Legislative Investigative Committee,* 372 U.S. 539 (1963); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960). This constitutional right specifically includes advancement of commonly held views and social goals through litigation. *United Trans. Union* v. *State Bar of Michigan,*

401 U.S. 516, 585-86 (1971). This essential means of promoting goals and securing objectives depends upon the support of individual members. Unless anonymity can be guaranteed, such support is likely to cease entirely, particularly where the association espouses unpopular and controversial beliefs. *NAACP* v. *Alabama, supra,* 357 U.S. at 459; *Bursey* v. *United States,* 466 F.2d 1059, 1085 (9th Cir. 1972). Identification, particularly by a historical adversary, has a "chilling" effect[8] upon the willingness of the member to continue to espouse association goals. This is so because identification places the member in a highly visible position, which, in turn, renders the member subject to the risk of various forms of retaliatory pressures.[9] As a three judge panel of the United States District Court for the District of Columbia recently remarked:

> "[i]t is well established that the requirements of public disclosure and reporting of membership lists cast a chilling effect upon an individual's right to associate freely and to voice personal views through organizational ties." *American Civil Liberties Union* v. *Jennings,* 366 F. Supp. 1041, 1055 (1973), *appeal pending sub nom Staats* v. *ACLU,* (Sup.Ct. No. 73-1413)

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[8] *Cf. Textile Wkrs.* v. *Darlington Mfg. Co.,* 380 U.S. 263, 275 (1965).

[9] In view of the commonly recognized antagonisms which exist between the Chamber and organized labor, individual Chamber members may well be foreclosed from supporting or remaining members in their association if their identities can be discovered by any labor organization during litigation. The fear of reprisals from labor organizations whether or not actually realized, is very likely to result in termination of membership in the Chamber, deter potential members from joining, and prevent altogether the continuation of many forms of associational litigation.

To be sure these authorities involve associations composed of natural persons. The Chamber's membership embraces corporations, partnerships and other forms of business organizations as well as individuals. This difference does not mean that a corporate membership association can be denied all First Amendment protection. It has long been held that corporations are persons within the meaning of the Fifth and Fourteenth Amendments. While the question has not been squarely decided, the Court has at least suggested that corporations are also entitled to exercise First Amendment rights. *Grosjean* v. *American Press Co.,* 297 U.S. 233, 243-44 (1935); *May Dept. Stores* v. *Labor Board,* 326 U.S. 376, 404 (1945) (Rutledge, J. concurring in part). These authorities raise at least a colorable claim of First Amendment protection here. And such protection including freedom of association should be accorded because corporate association members are potentially subject to the same liklihood of retaliation and pressure because of positions advocated as natural persons associations like the NAACP.[10]

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[10] If the Court is of a different opinion, this issue presents another important question which warrants immediate review. This Court has recently relaxed the standing requirements which associations must meet in order to have access to the courts. *Warth* v. *Seldin, supra.* See also *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). The future promises more association type litigation and accordingly, it is now timely to resolve the scope of First Amendment rights available to all associations, regardless of the nature of their members.

The courts below did not rule on this question, because they believed it unnecessary. It is nevertheless properly before the Court and should be decided so as to fully resolve the Chamber's assertion of a constitutional privilege to the confidentiality of the membership list. See *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 186 (1973); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 111, 112 (1964).

The holding below that such a basic right can be waived by simply initiating litigation is also contrary to the Court's ruling in *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). The Court, speaking through Mr. Justice Goldberg, specifically rejected early state court cases apparently holding that a litigant who initiates a legal proceeding to recover monetary compensation for personal injuries waives any right "to claim the inviolability of his person." 379 U.S. at 113. Instead, the Court suggested there would be "constitutional problems" with any rule holding that a litigant can be said to waive rights "by exercising his right of access to the federal courts." 379 U.S. at 114. Here, the district court relied upon the Chamber's suit on behalf of its Michigan member employers to hold that the Chamber had waived any constitutional claim supporting nondisclosure (Pet. App. p. 37a). Because disclosure strikes at the heart of the Chamber's ability to function as the representative of all its members, this ruling penalizes the Chamber's right of access to the federal courts to the same extent as a rule holding that a plaintiff in a negligence suit waives any right to assert protections against search and seizure of his person. Accordingly, the district court's ruling constitutes an improper extension to the federal courts of the state court cases previously rejected by the Court in *Schlagenhauf* v. *Holder, supra,* and review should be granted to prevent this development.

There could be circumstances where the identity of an association's members is properly subject to the disclosure provisions of the Federal Rules of Civil Procedure. However, this is not the situation here. The identity of the Chamber's Michigan members is irrelevant to the preemption issues posed by the underlying

litigation. As this Court stated in *Super Tire Engineering* v. *McCorkle,* 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availability of state welfare assistance for striking workers . . . pervades *every* work stoppage, affects *every* existing collective-bargaining agreement, and is a factor lurking in the background of *every* incipient labor contract. (Emphasis added)

Accord: *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 458-59 (1st Cir.), cert. denied, 414 U.S. 859 (1973). Whether any Michigan member of the Chamber other than Dow suffered strikes is irrelevant under this legal standard since the cumulative effect of all strikes upon all employers regardless of any membership association determines the underlying federal preemption issue raised by this litigation. The identity of all Michigan employers who have been subjected to strikes is readily available from the Michigan Employment Security Commission which also maintaines records of strike duration and the amounts of funds dispersed to striking employees. Thus, the Steelworkers have a comprehensive administrative source for all data relevant to the defense of this suit. As the Court noted in *Schlagenhauf* v. *Holder, supra,* 379 U.S. at 118: "The ability of the movant to obtain the desired information by other means if also relevant." [11]

And in *Warth* v. *Seldin, supra,* the Court precluded the Steelworkers from using the identity of the Chamber's Michigan members to challenge the Chamber's standing to initiate this litigation. Writing for the majority, Mr. Justice Powell stated (95 S.Ct. at 2211-12);

[11] In the *Grinnell* litigation this same information is available to the Steelworkers from the Rhode Island Department of Employment Security.

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. (Citing *National Motor Freight Traffic Assn.* v. *U.S.,* 372 U.S. 246 (1963)) . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. (Citing *Sierra Club* v. *Morton, supra*). So long as this can be established and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the courts jurisdiction.

Accordingly, this decision makes clear that no additional disclosure of the identities of any Chamber members is necessary to establish the Chamber's standing to initiate the underlying cause of action. This is not a cause then where the identities of the Chamber's Michigan members are of any relevance to the issues posed.

In short, the ruling below poses a critical dilemma for associations which wish to exercise their right to engage in representational litigation. All associations may now be required to identify their members in order to accomplish the litigative purposes for which the members sought anonymously to ban together. This Court should grant certiorari to review this question and to define the circumstances, if any, where disclosure of association membership lists may be appropriate in civil litigation.[12]

[12] This petition is unlike the one in *Auto Workers* v. *National Right to Work Legal Def. and Ed. Foundation,* 376 F. Supp. 1060 (D.D.C. 1974), appeal dismissed, —— F.2d ——, 88 LRRM 2314 (D.C. Cir. 1974), cert. denied, 419 U.S. 1132, where an "over-

II. There Must Be An Appeal Route Other Than Contempt To Obtain Judicial Review Of A Pre-Trial Order Where That Order As A Practical Matter Determines The Validity Of A Claim of Constitutional Immunity.

Before the significant and timely First Amendment question presented by this petition can be reached, the Court must consider an equally important threshold problem which also requires resolution. The court of appeals' judgment was that in these circumstances neither a writ of mandamus nor an appeal under 28 U.S.C. § 1291 will lie (Pet. App. pp. 5a-6a). The Chamber's certiorari petition presents the Court with an overdue opportunity "to derive a formula that will take hardship cases out from under the rigidity of previous declarations. . . ." (*Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1949)) with respect to immediate appeals from discovery orders where disclosure impinges upon constitutional rights and results in injury to a nationwide class of litigants. It is essential to our judicial system that all litigants have immediate access to the appellate courts to obtain effective review of constitutional questions which threaten interests far beyond the underlying litigation. As Chief Judge Haynsworth wrote in *United States* v. *Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966):

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riding and compelling need" going to the heart of the litigation was shown for the production of the Foundation's financial subscribers. There, the central allegation of the unions' action was that the Foundation had violated 29 U.S.C. § 411(a) (4) by acting as a conduit for "interested employers" financing litigation against various labor organizations, to which the subscribers' list was an essential element of proof.

> When a pretrial order is clearly erroneous, an appellate corrective ought to be available if compliance with the order would work a substantial and irreparable deprivation or if the only alternative is submission to a contempt order.

A. 28 U.S.C. § 1291 authorizes an immediate appeal from pretrial orders without the necessity of a contempt citation

The *Cohen* [13] doctrine plainly contemplates immediate access by parties to the appellate courts where interlocutory orders raise important questions which transcend the particular issues in the underlying litigation. In *Cohen,* the Court stressed the importance of the issue it was called upon to decide:

> "[W]e do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security . . . appealability would presents a different question." 337 U.S. at 547.

Similarly here, as set forth above, the dilemma which the instant discovery order poses for associations everywhere is an important and significant question which requires immediate resolution. To be sure the circuit courts of appeals agree the usual garden variety discovery order is not a "final order" within the scope of 28 U.S.C. § 1291. Wright & Miller, *Federal Practice & Procedure: Civil* § 2006. However, there is a split in the circuits with respect to the immediate appealability of interlocutory discovery orders under this provision

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[13] *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (collateral issues which raise important questions are immediately appealable under 28 U.S.C. § 1291).

where third party rights are affected. See *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 996 (10th Cir.), cert. denied, 380 U.S. 964 (1965). Here, the parties actually injured by the district court's discovery order are the Chamber's Michigan members who are not parties to this litigation. These members could not initiate an appeal of the discovery order without simultaneously revealing their identity and thereby mooting the appeal. *NAACP* v. *Alabama, supra,* 357 U.S. at 459; cf. *Preiser* v. *Newkirk,* — U.S. —, 95 S. Ct. 2330 (U.S. No. 74-107) (June 25, 1975). Thus, only the Chamber is in a position to perfect such an appeal on behalf of its Michigan members. An association must be able to assert the injured interests of its members particularly where, as here, the injury goes to the loss of anonymity and the membership is unable by operation of legal doctrines like mootness to assert its own injury.

In addition, this case is not the usual discovery order appeal where the discovered party simply objects to providing its opponent with information which might reveal tactical trial strategy. The theory of the underlying litigation and the expert studies which support the Chamber's position that state compensation for strikers is contrary to national labor policy is fully known to the Steelworkers from other discovery requests voluntarily complied with by the Chamber in this litigation. Moreover, the consequences of discovery here are not, as in the usual case, limited to the trial of the instant litigation. The relationship between the Chamber and its members is designed to be a permanent and continuing one. Discovery here threatens to sever these long-term relationships, and will have an adverse impact upon the right of corporate members to associate for the purpose of initiating common interest litigation long after this particular litigation is over.

In these unique circumstances, the authorities referred to above holding discovery orders non-appealable are readily distinguishable and the appealability question presented here is of significance to associations everywhere and one this Court has not previously addressed.[14]

The Court of Appeals ruled that the Chamber could perfect appeal of this important question by simply submitting to a contempt citation. However, the contempt route is not an assured means of perfecting an immediate appeal because a civil contempt citation is insufficient to permit appeal until the trial litigation concludes. *Fox* v. *Capital Co.,* 299 U.S. 105 (1936); *cf. Sibbach* v. *Wilson & Co.,* 312 U.S. 1,6-7 (1941); *Southern Ry. Co.* v. *Lanaham,* 408 F.2d 348, 350 (5th Cir. 1969) (C. J. Brown, dissenting). As the First Circuit candidly recognized in *Chamber of Commerce* v. *Hackett, (Grinnell* Pet. App. 7a): "Admittedly, there is less certainty as to whether an order adjudicating a

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[14] Even within the present scope of the *Cohen* doctrine, the Chamber is entitled to an immediate appeal under this "collateral order doctrine." For the reasons set forth *supra,* pp. 11-13, there is no connection between the identity of the Chamber's Michigan members and the legality of state payments to strikers under national labor policy. As we have also demonstrated above, contempt is not a viable alternative to an immediate appeal under 28 U.S.C. § 1291, and thus there is a great likelihood that any effective judicial review of this wholly collateral question will be irretrievably lost. Finally, the question of whether a membership association can be required to disclose the identities of its membership as a condition of engaging in associational litigation is "too important to be denied review." *Cohen* v. *Beneficial Indus. Loan Corp., supra,* 337 U.S. at 546. Since the Chamber's appeal fully satisfies all the elements for an immediate appeal, the court of appeals erred in dismissing this cause for lack of jurisdiction.

party in civil contempt would be appealable." Moreover, there is a difference of option among the circuits as to whether any type of contempt order is a prerequisite to appeal. Compare *United States* v. *Hemphill, supra;* and *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993 (10th Cir.) cert. denied, 380 U.S. 964 (1965) with *Bank Line* v. *United States,* 163 F.2d 133 (2d Cir. 1947); *Gialde* v. *Time, Inc.,* 480 F.2d 1295 (8th Cir. 1973); and the opinions of the Sixth and First Circuits appealed here.

The contempt process is lengthy and time consuming as well as uncertain. The resisting party must first be found guilty of *criminal* contempt and then must participate in a separate contempt proceeding and be cited with a contempt judgment before any putative appeal is available. *Fraser* v. *United States Court,* 145 F.2d 139, 144 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945). But such a proceeding may not actually provide any basis for appeal. See, *e.g., United States* v. *IBM Corp.,* 492 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974). A contempt citation then does not guarantee appealability of a discovery order. And requiring an aggrieved party even to risk contempt sanctions in order to obtain review with respect to a claim of First Amendment rights, itself creates a chilling effect, for many litigants may well choose to forebear from exercising such rights, rather than risk the penalties of fine or incarceration. Moreover, in association litigation, a criminal contempt citation places the burdent of compliance not upon the member whose association identity is about to be disclosed, but upon an officer of the association whose right of association is unaffected by the discovery order. Accordingly, the court of appeals erred both in declining to accept jurisdiction and by remitting the Chamber to an appeal route which may be entirely illusory.[15]

B. A Writ of Mandamus is appropriate to obtain review of a discovery order which impairs the free exercise of First Amendment Rights.

If an immediate appeal does not lie under the collateral order doctrine, a writ of mandamus is appropriate to review an order which impinges upon the exercise of fundamental rights. Indeed, the Court has already expressed its interest in resolving the role of mandamus as a means of obtaining immediate appellate review of a discovery order in similar circumstances.

On May 27, 1975, the Court granted a petition for a Writ of Certiorari to the Ninth Circuit in *Kerr* v. *U.S. District Court,* —— U.S. ————, 95 S. Ct. 1988 (U.S. No. 74-1023). In *Kerr,* as the Chamber contends here, California argues that some procedure for review must be available in circumstances where pre-trial discovery orders threaten irreparable harm to important third party interests. There, the underlying litigation involved a class action against California penal and correctional agencies to determine the due process requirements at state parole and disciplinary proceedings. Plaintiffs obtained a discovery order which, *inter alia,* required production

[15] Normally an immediate appeal lies after imposition of the other contempt sanctions permissible under Rule 37 Fed. R. Civ. Pro. See pp. 3-4, *supra.* However, sanctions such as dismissal of the suit or striking defenses effectively deprive the Chamber of participation in the underlying litigation while an appeal is perfected, argued and ultimately decided. Thus, these sanctions operate just as the district court's discovery order to deny the Chamber the right on behalf of its members of instituting litigation on behalf of its membership.

of the correctional files of over 1,000 California correctional facility inmates. The district court's protective order limited inspection of the inmates' files to plaintiff's counsel, limited the use of the files to the case at hand, and required inmates' consent before inspection of their files. Because this protective provision was inadequate, California sought a writ of mandamus to review the discovery order, which the Ninth Circuit dismissed on jurisdictional grounds.

In the instant litigation the district court's discovery order is also inadequate to prevent widespread disclosure of the identities of the Chamber's Michigan members and the fact of such disclosure reasonably interferes with important associational rights. As set forth, supra, p. 6, the district court's "protective" order grants access to the Chamber's Michigan membership list to any and all Steelworkers' employees who "prepare for and assist in the defense of this action." Even assuming that the employees, who receive copies of this list, have at least some tangential relationship to this case, it is totally unreasonable and contrary to human nature to expect this knowledge to disappear from memory when this litigation concludes. Steelworkers' employees and agents, having seen and worked with these lists in connection with this case, will not simply expunge from their memories the names of the Chamber's members. Instead, the identity of the Chamber's members, and their connection with this and other litigation brought by the Chamber, will forever be exposed to the Steelworkers and others who gain access to the membership list, including representatives of the AFL-CIO who are also members of the Steelworkers' Union. Long after the underlying litigation concludes and the district court

is without jurisdiction to take any steps to enforce its protective order, this information will remain in the possession of a labor organization which, like most unions, is an intractable political opponent of the Chamber. This entreé provides an accurate laundry list of those employers in Michigan and elsewhere (in the case of conglomerates) [16] who could be subjected to punitive pressures in retaliation for their support of the Chamber's labor relations objectives in future matters unrelated to the instant litigation.

A writ of mandamus should have been granted by the court of appeals because the district court committed fundamental error by ordering disclosure of the Chamber's Michigan membership list and by failing to safeguard such disclosure against widespread dissemination with an adequate protective order. Therefore, the instant appeal presents the Court with an important opportunity to define and elaborate the factual and substantive areas when a writ of mandamus in pre-trial discovery is appropriate, and will further permit the Court to give direction to the courts of appeals in creating more uniform mandamus standards. See generally, Comment, "Appealability in the Federal Courts", 75 Harv. L. Rev.

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[16] While the district court's Memorandum Opinion purports to limit disclosure to only those of the Chamber's members who are subject to the Michigan Employment Security Act, the order also identifies Chamber members outside Michigan because many of these members are among the nation's larger corporations and conglomerates with operations in numerous other states.

350, 375-78 (1961).[17] Such definitive guidance is essential particularly because this Court has already embarked upon the task of defining a more flexible mandamus standard. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 255 (1957); *Schlagenhauf* v. *Holder*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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[17] The Eighth Circuit grants mandamus to review an interlocutory discovery order which present a "really extraordinary" question and where appeal after disclosure would be inadequate. *Pfizer* v. *Lord*, 456 F.2d 515, 518 (8th Cir. 1972). The Seventh Circuit grants mandamus to review such orders where there is a question of substantial importance and where appeal would be inadequate. *Harper and Row Publishers, Inc.* v. *Decker*, 423 F.2d 487, 492 (7th Cir. 1970), affirmed, 400 U.S. 348 (1971) (by an equally divided court). The Fourth Circuit allows mandamus to review and vacate an interlocutory discovery order on the clearly erroneous standard. *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (4th Cir. 1973), cert. denied, 417 U.S. 918 (1974).

APPENDIX

PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1031

THE DOW CHEMICAL COMPANY, *Plaintiffs,*

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al, *Defendant,*
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Intervenor-Appellee.*

Appeal from the United States District Court for the Eastern District of Michigan.

Opinion of the Court

Decided and Filed July 1, 1975.

Before: WEICK, LIVELY and ENGEL, *Circuit Judges.*

ENGEL, C.J. Appellant Chamber of Commerce of America (Chamber) and Dow Chemical Company (Dow) instituted this action in the district court on July 25, 1972 against the individual members of the Michigan Employment Security Commission (MESC) for a declaratory judgment and an injunction against enforcement of the Michigan Employment Security Act to the extent it is construed to authorize payment of unemployment benefits to striking employees. On September 5, 1972, United Steelworkers of America, AFL-CIO (Steelworkers) was granted leave to intervene as a defendant to protect the interests of their members who are employees of Dow. The complaint alleged that such payments contravene the nation's labor policy by disrupting the scheme of free collective bargaining and are thus in violation of the Supremacy Clause of Article VI of the Constitution.

In the course of pretrial discovery, the Steelworkers served upon the Chamber several interrogatories, including Interrogatory Number 1 which reads:

> 1. List the name, principal office address and Michigan address of each "underlying" member business firm of the Chamber who is now or who at any time since January 1, 1968 has been an employer subject to the Michigan Employment Security Act, 12 M.S.A. § 17.501, *et seq.* (hereafter "MESA").

The Chamber filed objections to several of the interrogatories, particularly Number 1. It claimed that the Chamber's members enjoy a First Amendment freedom of association which will be "chilled" if the Chamber is required to turn over a membership list to the Steelworkers and that irreparable injury will occur upon disclosure. The Chamber further claims that its members' identities are of no relevance to the action and are not needed by the Steelworkers.

On October 8, 1974, the district court ordered the Chamber to answer Interrogatory No. 1 and on November 4, 1974, the Chamber filed a notice of appeal. No certification under 28 U.S.C. § 1292(b) was issued by the district judge.

The Chamber here has alleged two alternative bases for this court's jurisdiction to hear its appeal.[1] Its main contention is that the district court order was a "final decision" and thus appealable under 28 U.S.C. § 1291.[2] In

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[1] The steelworkers filed a motion to dismiss the appeal on the grounds that this court lacked jurisdiction to review the district court order. By order of March 4, 1975, that motion was denied without prejudice, the court noting that the appealability question could be reviewed by the panel to which the appeal is assigned for argument.

[2] 28 U.S.C. § 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Cobbledick v. *United States,* 309 U.S. 323 (1940), the Supreme Court discussed the requirement, now embodied in § 1291, that a district court decision be final before it becomes appealable.

> For purposes of appellate procedure, finality—the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. As an instrument to such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . .' 209 U.S. at 326.

In *Catlin* v. *United States,* 324 U.S. 229 (1945), the court further noted that "A" 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." 324 U.S. at 233.

It is clear that the order here appended from does not terminate the litigation. Appellant contends, however, that under the "collateral order doctrine" enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), this order is appealable under § 1291 because it falls within the small class of orders ". . . . which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Several courts of appeals have considered the question of whether a discovery order is appealable under the "collateral order doctrine" of *Cohen, supra.* Most circuit courts which have considered the question have rejected the applicability of *Cohen* to discovery orders. *Gialde* v. *Time, Inc.,* 480 F. 2d 1295 (8th Cir. 1973), *Borden Company* v. *Sylk,* 410 F. 2d 843 (3rd Cir. 1969), *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.,* 380 F. 2d 277 (2nd Cir. 1976), *Paramount Film Distributing Corp.* v. *Civic Center Theatre,* 333 F. 2d 358 (10th Cir. 1964). We follow these cases and hold that the district court's discovery order is not appealable as a final decision under § 1291. To accept appellant's view that such discovery order are appealable would ". . . invite the inundation of appellate dockets with what have heretofore been regarded as nanappealable matters." *Borden Company* v. *Sylk,* 410 F. 2d 843, 846. We decline to do so.

Nothing in our decision here is inconsistent with this court's decision in *Ochsner* v. *Millis,* 382 F. 2d 618 (6th Cir. 1967). In *Ochsner,* an interference proceeding was being conducted in the United States Patent Officer. For use in the interference proceeding, the junior parties took the deposition of the senior party, who refused to answer certain questions propounded to him. The junior parties filed a motion in the district court to compel the testimony, but the motion was denied.

This court in *Ochsner* held the district court order appealable under § 1291. The court reasoned that the junior parties had no other means of obtaining effective review of the action of the district court. The court noted that review in the Court of Customs and Patent Appeals pursuant to 35 U.S.C. § 141 would be ineffective because no additional evidence could be put into the record, and therefore the testimony which the junior parties were attempting to procure could not be put into the record in that appeal. Alternatively, if an appeal were taken pursuant to 35 U.S.C. § 146 to the district court where additional testimony could be taken, this advantage would be counterbalanced to some extent by the presumption of administrative correctness. Thus, the court concluded, the action of the district court was ". . . a final decision for all practical purposes, for if it be error, this is the only opportunity which the junior parties will have to *effectively* review the District Court's order." 382 F. 2d at 623.

We are not faced with that situation here. Unlike the appellants in *Ochsner,* appellant here can obtain effective review of the district court order by failing to comply with the order and perfecting an appeal should the district court impose sanctions under Rule 37(b) of the Federal Rules of Civil Procedure. In *United States* v. *Ryan,* 402 U.S. 530 (1971), the Supreme Court faced a similar question where a person sought review of a district court order requiring that he produce records before a federal grand jury. In holding that the order was non-appealable, the Supreme Court stated:

> But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.
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> 402 U.S. at 532 (footnote omitted)

Ryan involved production of documents before a federal grand jury, but we think the reasoning of the Court is applicable here. Should the Chamber refuse to obey the order and sanctions are applied, review of the order may be obtained. In the present posture of this case, however, we conclude we have no jurisdiction under 28 U.S.C. § 1291 to hear this appeal.

Appellant also contends that this court has jurisdiction to hear this appeal under the All Writs Act, 28 U.S.C.

§ 1651(a). We note that the record does not reveal that the appellant has filed with the clerk of this court proof of the mandamus petition upon the district court judge as required by Federal Rules of Appellate Procedure 21(a). We also note that the petition was not filed until some four months after the entry of the order appealed from, which might in itself be grounds for dismissal of the appeal. Cf. *In Re United Shoe Machinery Corporation*, 276 F. 2d 77 (1st Cir. 1960). We need not decide whether these procedural deficiencies are grounds for dismissal, however, since we conclude that appellant has failed to meet its burden of showing extraordinary circumstances which would entitle it to mandamus.

The appeal is dismissed for lack of appellate jurisdiction. Costs to appellees.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 38644

THE DOW CHEMICAL COMPANY and
THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Plaintiffs,

v.

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendants,

AND

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor.

Order Compelling Plaintiffs To Answer Interrogatories

This court having heretofore filed its Memorandum Opinion herein under date of June 27, 1974, and having been made acquainted with the contention of the parties regarding the phrasing of an order compelling discovery and being fully advised,

IT IS ORDERED that:

A. Plaintiff The Dow Chemical Company answer under oath, within thirty (30) days from the date of this order, Interrogatories Nos. 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the Revised Amended Interrogatories previously served by defendant-intervenor.

B. Plaintiff The Chamber of Commerce of the United States of America answer under oath, within thirty (30) days from the date of this order, Interrogatories Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

and 22 of the Revised Amended Interrogatories previously served by defendant-intervenor.

C. Plaintiff The Chamber of Commerce of the United States of America need not answer Interrogatory No. 9 of the Revised Amended Interrogatories unless and until this case reaches the United States Supreme Court.

D. Defendant-intervenor United Steelworkers of America, AFL-CIO-CLC shall not make use of the list of member business firms which plaintiff The Chamber of Commerce of the United States of America must provide in its answer to Interrogatory No. 1 of the Revised Amended Interrogatories or disclosure the identity of such member business firms except to defendant-intervenor United Steelworkers of America, AFL-CIO-CLC's employees and then only when necessary to prepare for and assist in the defense of this action.

/s/ JOHN FEIKENS
John Feikens
United States District Judge

Dated: Detroit, Michigan, October 4, 1974.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1031

THE DOW CHEMICAL COMPANY,
Plaintiff,

THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendant,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

Before: WEICK, LIVELY and ENGEL, *Circuit Judges.*

Judgment

(Filed July 1, 1975)

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same hereby dismissed for lack of appellate jurisdiction.

Costs to appellees.

ENTERED BY ORDER OF THE COURT.
JOHN P. HEHMAN, *Clerk*
By /s/ GRACE KELLER
Grace Keller
Chief Deputy

Order

(Filed August 21, 1975)

(Caption Omitted in Printing)

Before: WEICK, LIVELY and ENGEL, *Circuit Judges.*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
John P. Hehman

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.A. 38844

THE DOW CHEMICAL COMPANY and
THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Plaintiffs,

v.

S. MARTIN TAYLOR, Director of the Michigan Security Commission, and WALTER CAMPBELL, FRANK C. PADZIESKI, ALEX FULLER, RAYMOND M. LYONS and BARRY BROWN, Members of the Michigan Employment Security Commission,

Defendants.

Complaint for Declaratory Judgment and Injunction

THE DOW CHEMICAL COMPANY (hereafter "Dow") and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA (hereafter "the Chamber"), by their attorneys, for their complaint against S. MARTIN TAYLOR, WALTER CAMPBELL, FRANK C. PADZIESKI, ALEX FULLER, RAYMOND M. LYONS and BARRY BROWN, Defendants, allege as follows:

I. INTRODUCTORY STATEMENT

Dow, and the Chamber on behalf of its Michigan member-employers, seek to have this Court declare invalid and enjoin the application of the Michigan Employment Security Act, 12 M.S.A. § 17.051 *et. seq.* (hereafter "MESA"), insofar as unemployment benefits thereunder are provided to striking employees. Such an application of MESA, as applied herein to striking employees of Dow, violates the Supremacy Clause of Article VI, Clause 2 of the United States Constitution as repugnant to and preempted by the Labor Management Relations Act of 1947, as amended, 29

U.S.C. § 151 *et. seq.* (hereafter "LMRA"). Furthermore, since under MESA the benefits paid to such striking employees are directly charged against the account of their employer for the purposes of calculating the employer's future unemployment benefit contributions, said application of MESA thereby penalizes such employers by reason of their employees' strike and thus contravenes the Due Process Clause of Amendment XIV, Section 1 of the United States Constitution.

II. Jurisdiction

This Court has original jurisdiction of this action under 28 U.S.C. § 1331, 28 U.S.C. § 1337, and the Federal Declaratory Judgment Act, as amended, 28 U.S.C. §§ 2201-02.

III. Plaintiffs

1. Dow is a domestic corporation organized and existing under and by virtue of the laws of the State of Delaware and at all times mentioned herein has been and is qualified to do business in the State of Michigan with offices and plants located in the State of Michigan. Dow is an employer subject to ESA and is, therefore, required to make contributions to the Michigan Employment Security Commission (hereafter "Commission"). Dow is also an employer subject to LMRA and obligated thereunder to bargain collectively with the bargaining representative of its employees.

2. The Chamber is an association, with its principal office in Washington, D.C., consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and underlying membership of approximately 5,000,000 business firms and individuals of which a substantial number are employers subject to MESA and, therefore, required to make contributions to the Commission, as well as employers subject to LMRA

and obligated thereunder to bargain collectively with the bargaining representative of their employees. The Chamber brings this action on behalf of said Michigan member-employers.

IV. Defendants

1. Defendant S. Martin Taylor is the Director of and an Ex Officio Member of the Commission, and Defendants Walter Campbell, Frank C. Padzieski, Alex Fuller, Raymond M. Lyons and Barry Brown are Members of the Commission. The Commission has its principal office and place of business at 7310 Woodward Avenue, Detroit, Michigan 48202.

2. The above-named Defendants are charged under the laws of the State of Michigan with the enforcement, operation and execution of MESA, and have applied MESA so as to provide unemployment benefits to striking employees and to charge such benefits against the accounts of the employers involved, an application of MESA which is herein challenged as being in conflict with the Constitution of the United States.

V. Factual Allegations

1. Since on or about February 6, 1972, approximately 166 employees of Dow (hereafter "striking employees") have been engaged in a strike against Dow and, as a result of said labor dispute, have not worked for Dow since that date.

2. On or about February 8, 1972, and at various dates thereafter, approximately 130 of the striking employees applied at various branch offices of the Commission for unemployment benefits under MESA. Pursuant to Section 29(8) of MESA, which provides *inter alia* that "[a]n individual shall be disqualified for benefits for any week with respect to which his total or partial employment is due to a labor dispute in active progress . . .", the striking em-

ployees were declared ineligible for benefits for the week ending February 12, 1972, and for each succeeding week that their unemployment was due to a labor dispute.

3. Thereafter, on or about February 11, 1972 and at various subsequent dates, the striking employees described in paragraph (2) above obtained interim employment, earned remuneration therefrom and, in each instance, were subsequently laid off from such interim employment. The vast majority of said striking employees did not receive remuneration in excess of $25.00 from their interim employers nor did they work for such interim employers in excess of eight hours. Many of the striking employees obtained their interim employment as the result of assistance from their Union, Local 14055, Allied Technical Workers, including advertisements placed in various local newspapers on or about February 22, 1972 advertising that a number of the strikers were willing "to do any type of work, any hours, any length of time from a few hours to a day or more. Any wage will be considered."

4. Following their layoff from interim employment, said striking employees reapplied with the various branch offices of the Commission for unemployment benefits under MESA. In each instance, the branch offices, acting pursuant to the direction and under the authority of the Defendants, held that the interim employment terminated any possible disqualification under Section 29(8) of MESA; that the striking employees were, accordingly, eligible for unemployment benefits from that date; and that the Commission was precluded from reimposing such disqualification after termination of the interim employment regardless of its duration or nature.

5. After notice of such decisions, Dow immediately notified each of the striking employees involved that "suitable work has been and is available now" for them at Dow. None of said striking employees thereafter returned to work at Dow. A protest to the continuation of unemployment benefits, as a result, was filed by Dow with the appropriate branch offices of the Commission.

6. On or about March 21, 1972, the Commission denied said protest on the basis that Dow's offer of employment was "not an offer of suitable work" under Subsection 29 (7)(a) of MESA since the position offered was "vacant due directly to a strike, lockout or other labor dispute." The Commission's branch offices were instructed to notify the striking employees and Dow that the striking employees were "*not* disqualified for having refused an offer of work." (emphasis the original's).

7. Since the Commission's actions described in paragraphs 4 and 6 above, vouchers have been drawn on the accounts maintained by the Commission in order to effectuate the payment of unemployment benefits to the striking employees and it is contemplated that amount of said benefits will, pursuant to Section 17(c) of MESA, be charged against Dow's "rating account" which reflects the contribution payments and benefit charges of Dow under MESA; unless enjoined, Defendants will (a) continue to provide unemployment benefits to striking employees on a weekly basis for at least 26 weeks with the possibility of further extension, (b) debit commensurate charges against Dow's "rating account," and (c) similarly effect the payment of unemployment benefits to employees on strike against member-employers of the Chamber and charge accordingly their respective "rating accounts."

8. The charges made against Dow's "rating account," or against the "rating account" of member-employers of the Chamber, by reasons of the Commission actions described in paragraph 7 above, will adversely affect the "rating account percentage" of Dow and said other employers and require, pursuant to Section 19(a)(2) of MESA, that Dow and said other employers make increased contribution payments to the Commission; unless enjoined, it is contemplated that the additional payments required

of Dow alone, which would not have been incurred but for the Commission actions described in paragraph 7 above, already far exceed $10,000 and will, on an annual basis, exceed $100,000.

9. On an average basis, without regard to the food stamp benefits provided to striking employees under 7 U.S.C. §§ 2011 *et. seq.* and other forms of public assistance which, upon information and belief, Plaintiffs believe that the striking employees are receiving, the unemployment benefits which Defendants are providing to the striking employees have been the equivalent of approximately 49 per cent of said employees' pre-strike weekly gross pay less withheld Federal and State taxes. The average weekly gross pay less withheld Federal and State taxes for the striking employees for the last pay period prior to the strike was $162.59. The average weekly unemployment benefits provided to the striking employees by Defendants has been $79.07. Unless enjoined, said unemployment benefits will continue to constitute a substantial alternate source of income for a substantial number of the striking employees who presently are engaged in, or who may hereafter engage in, a strike against member-employers of the Chamber.

10. The striking employees have continued to reject Dow's various offers of strike settlement as a direct result, upon information and belief, of their knowledge that unemployment benefits have been provided to them, and expectation that such benefits will continue to be provided to them, by Defendants. Each week that the strike continues, Dow incurs substantial economic injury and, in addition, faces the threat of a loss of a significant and irreplaceable market position. Dow, and similarly-situated member-employers of the Chamber, are also suffering and will continue to suffer irreparable injury in that, regardless of the eventual outcome of this action, the collective bargaining process will have been unalterably damaged. Although quantifying the damage so incurred is difficult,

the violation of the right to free collective bargaining, as guaranteed to Plaintiffs and other employers as hereafter described, creates in excess of $10,000 in damages, excluding interests and costs to Plaintiffs individually. The Plaintiffs have no adequate remedy at law for any of the aforesaid injuries.

11. None of the striking employees entitled to or presently receiving unemployment benefits, and no person so situated who hereafter may apply for or receive such benefits, have been made parties to this action although they may have or claim an interest in it and may be affected by the outcome for the reason that they are too numerous to be joined and timely served and that to require such joinder and service would unduly delay the action to Plaintiffs' irreparable injury.

VI. First Cause of Action

For a first cause of action Plaintiffs allege:

1. The payment by Defendants of unemployment benefits to the striking employees, and to employees on strike against or who hereafter may engage in a strike against member-employers of the Chamber, deprives Dow and said member-employers of the right to engage in free collective bargaining, without state interference or state subsidization of one of the parties thereto, as guaranteed by the LMRA; frustrates significantly the policies of the LMRA by encouraging industrial strife; constitutes an unlawful intrusion by the State of Michigan into the field of labor-management relations which has been preempted by the LMRA; indirectly, but not insubstantially, requires Dow and said member-employers to finance through their contributions to the Commission strikes against themselves to their irreparable injury; and, for all of the foregoing reasons, violates the Supremacy Clause of Article VI, Clause 2 of the Constitution of the United States.

2. The payment by Defendants of unemployment benefits to the striking employees, and to employees on strike against or who hereafter may engage in a strike against member-employers of the Chamber, serves no legitimate purpose under the police power of the State of Michigan but, in fact, is against the public interest of the State and its citizens because, among other things, it operates to promote economic stagnation, increases the tax burden, contributes to inflation, and adds to the business costs which makes the State less competitive in attracting and holding industries affording employment, tax revenues, and economic well-being to the State.

VII. Second Cause of Action

For a second cause of action Plaintiffs allege:

1-2. Plaintiffs reallege and reiterate each and every allegation set forth above in First Cause of Action.

3. Since under MESA, as described above, the payment by Defendants of unemployment benefits to the striking employees, and to employees on strike against or who hereafter may engage in a strike against member-employers of the Chamber, are charged against the "rating accounts" of said employers, such action by Defendants denies entitlements to Plaintiffs without due process of law and thereby violates the Due Process Clause of Amendment XIV, Clause 1 of the Constitution of the United States.

VIII. Prayer For Relief

Wherefore, Plaintiffs pray that this Honorable Court:

1. Enter a final judgment pursuant to 28 U.S.C. §§ 2201-02 declaring that the payment by Defendants of unemployment benefits to strikers is an unlawful application of MESA on the grounds that it is violative of the Supremacy Clause of Article VI, Clause 2

of the United States Constitution and the Due Process Clause of Admendment XIV, Clause 1 of the United States Constitution;

2. Enter preliminary and permanent injunctions, pursuant to Rule 65, F.R.C.P., enjoining Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from authorizing the payment of unemployment benefits to strikers and from drawing vouchers on the accounts maintained by the Commission in order to effectuate the payment of such benefits;

3. Enter preliminary and permanent injunction pursuant to Rule 65, F.R.C.P., enjoining Defendants, their successors in office, agents and employees, and all other persons in active concert or participation with them, from charging the "rating accounts" of Dow or member-employers of the Chamber as the result of the payment of unemployment benefits to strikers or from otherwise adversely affecting said employers as the result of the payment of such benefits; and

4. Grant such other and further relief as this Court shall deem appropriate.

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STATE OF MICHIGAN)
COUNTY OF MIDLAND)) SS.

The undersigned, Thomas W. Misner, being duly sworn, deposes and says that he is one of the co-counsel for one of the plaintiffs in the above entitled action, that he has read the foregoing complaint, knows the contents thereof and that said complaint is true to the best of his knowledge, except as to matters stated therein to be alleged on information and belief, and as to those matters, he is informed and believes that they are true.

/s/ THOMAS W. MISNER
Thomas W. Misner
Co-counsel for
The Dow Chemical Company

(Subscription Omitted in Printing)

STATE OF MICHIGAN)
COUNTY OF WAYNE)) SS.

The undersigned, , being first duly sworn, upon oath deposes and says that he is one of the co-counsel for one of the plaintiffs in the above-entitled action, that he has read the foregoing complaint, knows the contents thereof and that said complaint is true, to the best of his knowledge, except as to matters stated therein to be alleged on information and belief, and as to those matters, he is informed and believes that they are true.

/s/ (SIG. ILLEGIBLE
Co-counsel for
The Chamber of Commerce of
the United States of America

(Subscription Omitted in Printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 38644

THE DOW CHEMICAL COMPANY and
THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Plaintiffs,

v.

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendants,

AND

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, et al.,
Intervenors.

Interrogatories of Defendant-Intervenor United Steelworkers of America, AFL-CIO To Plaintiff Chamber of Commerce of The United States of America

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant Intervenor United Steelworkers of America, AFL-CIO, hereby requests that the following interrogatories be answered under oath by Plaintiff Chamber of Commerce of the United States of America or any of its agents competent to testify on its behalf with knowledge of the facts about which inquiry is made:

1. List the name, principal office address and Michigan address of each "underlying" member business firm of the Chamber of Commerce of the United States of America (hereafter Chamber) who is now or who at any time since January 1, 1968 has been an employer subject to the Michigan Employment Security Act 12 M.S.A. § 17.501, *et seq.* (hereafter "MESA").

2. Of the business firms named in response to Interrogatory No. 1, list each one whose employees were engaged in a strike in the State of Michigan at any time during the period January 1, 1968 to April 1, 1973.

3. With respect to each employer and each strike referred to in the answer to Interrogatory No. 2, state the following:

(a) The date the strike commenced;

(b) The date the strike terminated;

(c) Method of termination, e.g., agreement between the parties, Union's loss of bargaining agent status;

(d) A detailed description of the employer's last economic offer prior to the strike, including a list of each wage or fringe benefit components of such offer and the cost, as computed by the employer, of each such wage or fringe benefit component;

(e) A detailed description of the terms of the economic settlement on which basis the strike was terminated, including a list of each wage or fringe benefit component of such settlement and the cost, as computed by the employer, of each such wage or fringe benefit component; and

(f) The name of the union which conducted the strike.

4. Of the employers referred to in the answer to Interrogatory No. 2, name each one whose account was charged for unemployment benefits paid to striking employees pursuant to MESA, during a strike, and for each strike, state the following:

(a) The total amount charged to the employer's account for unemployment benefits;

(b) The total number of strikers who received unemployment benefits from the State of Michigan; and

(c) The total number of strikers who did not receive unemployment benefits from the State of Michigan.

5. Were any of the strikes referred to in the answers to Interrogatories Nos. 2 and 3 simultaneously directed against plants or facilities of the same employer located outside of the State of Michigan? If so, for each such employer and each such strike state the following:

(a) The name and address of each plant or facility against which the strike was directed (include Michigan plants and facilities);

(b) The number of striking employees as of the commencement of the strike at each plant or facility named in (a);

(c) The total number of strikers at each plant or facility named in (a) who received state unemployment benefits during the strike; and

(d) The total number of strikers at each plant or facility named in (a) who did not receive state unemployment benefits.

6. Were any of the strikes referred to in the answers to Interrogatories Nos. 2 and 3 simultaneously directed against other employer participants in a formal or informal multi-employer bargaining arrangement? ("Formal multi-employer arrangement" refers to an employer association or other combination which engages in collective bargaining on a single collective bargaining units basis. "Informal multi-employer arrangement" refers to a group of employers, such as the Coordinating Committee Steel Companies, who technically comprise separate bargaining units but who, nevertheless, join together for purposes of conducting collective bargaining negotiations with a common union or unions.) If so, for each such strike state the following:

(a) The name of each employer against which the strike was directed and for each such employer:

(i) The name and address of each plant or facility against which the strike was directed (include Michigan plants and facilities);

(ii) The number of striking employees as of the commencement of the strike at each plant or facility named in (a)(i);

(iii) The total number of strikers at each plant or facility named in (a)(i) who received state unemployment benefits during the strike; and

(iv) The total number of strikers at each plant or facility named in (a)(i) who did not receive state unemployment benefits.

(b) The union or unions which conducted the strike;

(c) The date the strike commenced;

(d) The date the strike terminated;

(e) Method of termination, e.g., agreement between the parties, Union's loss of bargaining agent status;

(f) A detailed description of employer association or group's last economic offer prior to the strike, including a list of each such wage or fringe benefit component of such offer and the cost, as computed by the employer, of each such wage or fringe benefit component; and

(g) A detailed description of the terms of the economic settlement on which basis the strike was terminated, including a list of each wage or fringe benefit component of such settlement and the cost, as computed by the employer, of each such wage or fringe benefit component.

7. List the title of each and every communication, booklet, book, pamphlet, periodical, circular, printed speech, memorandum, instructions, news release, or other document issued or distributed in the past ten years by the Chamber or its affiliates to constituent business firms or to the public, generally containing material referring to the receipt of unemployment compensation benefits by strikers.

8. List by title and recipient every communication, booklet, book, pamphlet, periodical, circular, printed speech, memorandum, or other document which contained material referring to the receipt of unemployment compensation benefits by strikers and which was sent in the past ten years by the Chamber, its agents or affiliates, to the following:

(a) The President of the United States or his assistants;

(b) Any individual who is now a Justice of the Supreme Court of the United States;

(c) Members of the House of Representatives or Senate of the United States or their legislative or administrative assistants; and

(d) Members of the Legislature of the State of Michigan.

9. List every communication received by the Chamber in the past ten years from any individual now serving as a Justice of the Supreme Court of the United States; the subject matter of which related to the achievement of the Chamber's legislative, social policy or litigation objectives.

10. Describe in detail each and every procedure or program utilized by the Chamber in the past ten years to oppose or combat the payment of unemployment compensation to striking employees.

11. With respect to each procedure or program referred to in the answer to Interrogatory No. 10, state the following:

(a) The name, title and address of the individual(s) principally responsible for implementing said procedures or programs; and

(b) The amount of money expended by the Chamber on behalf of each such procedure or program.

12. In connection with the implementation of any procedure or program referred to in the answer to Interrogatory No. 10, state whether the Chamber has in the past ten years made any payment of money to the following and, if so, the total amount of such payments:

(a) Armand Thieblot;

(b) Ronald Cowin;

(c) Herbert Northrup;

(d) Edwin J. Doherty; and

(e) North American Newspaper Alliance.

13. Will the Chamber attempt to prove that the receipt or expectation of unemployment compensation benefits in Michigan causes workers in that state to stiffen bargaining demands beyond what they would have been absent such benefits? If so, describe in detail every fact, statistics, document or other item of evidence which the Chamber will offer as its proof thereof.

14. Identify every strike or settlement (if any) in the State of Michigan in which the Chamber will contend that the workers made higher bargaining demands than they would have absent the availability of unemployment compensation benefits, and for each such strike or settlement, describe in detail every fact, document or other evidentiary basis which the Chamber will offer as proof of such

a conclusion, and for each such strike or settlement, state the following:

(a) The name and address of the employer;

(b) The name of the union;

(c) Whether plants or facilities of the same employer located outside the State of Michigan were struck as part of the same strike or settled as part of the same settlement and, if so, the name and address of every plant or facility involved in the strike or settlement;

(d) Whether employers other than that named in (a) were struck as part of the same strike or settled as part of the same settlement and, if so, the name and address of every plant or facility involved in the strike or settlement;

(e) The number of strikers (by plant) at the commencement of the strike;

(f) The number of strikers (by plant) who received state unemployment benefits during the strike;

(g) The number of strikers (by plant) who did not receive state employment benefits during the strike;

(h) The bargaining demands of the union both at the commencement of negotiations and just prior settlement; and

(i) The bargaining demands which would have been made by the union but for the availability of unemployment benefits and the evidentiary basis which the Chamber will offer to support its description of such demands.

15. Will the Chamber attempt to prove that the receipt or expectation of unemployment compensation benefits in Michigan causes workers in that state to strike

when they would have settled absent such benefits? If so, describe in detail every fact, statistic, document or other item of evidence which the Chamber will offer as its proof thereof.

16. Identify every strike (if any) in the State of Michigan which the Chamber will contend would have been settled absent the availability of unemployment compensation, and for each such strike, describe every fact, document or other evidentiary basis which the Chamber will offer as proof of such a conclusion and for each such strike state the following:

(a) The name and address of the employer;

(b) The name of the striking union;

(c) Whether plants or facilities of the same employer located outside the State of Michigan were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(d) Whether employers other than that named in (a) were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(e) The number of strikers (by plant) at the commencement of the strike;

(f) The number of strikers (by plant) who received state unemployment benefits during the strike; and

(g) The number of strikers (by plant) who did not receive state unemployment benefits during the strike.

17. Will the Chamber attempt to prove that the receipt or expectation of unemployment compensations benefits in Michigan causes workers in that state to continue a strike for longer than they would have absent such benefits? If so, describe in detail every fact, statistic, document or other item of evidence which the Chamber will offer as its proof thereof.

18. Identify every strike (if any) in the State of Michigan which the Chamber will contend was prolonged by the availability of unemployment compensation, and for each such strike, describe in detail every fact, document or other evidentiary basis which the Chamber will offer as proof of such a conclusion, and for each such strike, state the following:

(a) The name and address of the employer;

(b) The name of the striking union;

(c) Whether plants or facilities of the same employer located outside the State of Michigan were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(d) Whether employers other than that named in (a) struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(e) The number of strikers (by plant) at the commencement of the strike;

(f) The number of strikers (by plant) who received state unemployment benefits during the strike;

(g) The number of strikers (by plant) who did not receive state unemployment benefits during the strike;

(h) The date the strike commenced;

(i) The approximate date the strike would have ended but for the availability of unemployment benefits (including the Chamber's explanation for how it arrived at this date); and

(j) The date the strike actually ended.

19. Does the Chamber intend to offer any statistical comparisons or studies of the length and cost of strikes in Michigan (or Rhode Island and New York) and the length and cost of strikes of similar size in similar industries in states not granting unemployment benefits to strikers? If so, identify each such comparison or study by its title, author and date.

20. Will the Chamber offer in evidence (in addition to the affidavits already filed with the Court) any documents, transcripts of interviews or other evidentiary material directed at the effect on strikes or settlements of the actual or expected receipt of unemployment benefits in Michigan? If so, describe in detail each such document, transcript of interview or other evidentiary material.

21. Will the Chamber offer any empirical evidence and expert testimony as to the nature and scope of the long-term impact on industry pricing and competitiveness of longer strikes and costlier outcomes allegedly caused by the availability of unemployment benefits? If so, state the following:

(a) The nature of such empirical evidence, including the title of any supporting statistical or economic studies; and

(b) The name and position of any individual who will be offered as an expert witness on this subject.

22. Will the Chamber offer any empirical evidence and expert testimony as to the nature and scope of the short-term impact on consumer demand of longer strikes and costlier outcomes allegedly caused by the availability of unemployment benefits? If so, state the following:

(a) The nature of such empirical evidence, including the title of any supporting statistical or economic studies; and

(b) The name and position of any individual who will be offered as an expert witness on this subject.

These interrogatories are continuing in nature so as to require timely supplemental answers should the Chamber, its affiliates or agents, obtain additional information, regardless of the source, between the time answers are served and the date of trial.

Dated: April 28, 1973.

CARL B. FRANKEL
Assistant General Counsel
United Steelworkers of America,
AFL-CIO

/s/ CARL B. FRANKEL
Carl B. Frankel

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Attorneys for Defendant-Intervenor
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(Caption omitted in printing)

Memorandum Opinion

On April 28, 1973 the defendant-intervenor, United Steelworkers of America, served interrogatories upon plaintiffs Dow Chemical Company and the United States Chamber of Commerce. The first twelve of these were directed exclusively to the Chamber (the Chamber interrogatories). The remaining ten were addressed to both plaintiffs. These will be referred to as the Dow interrogatories, although what is said here concerning them applies equally to their Chahber-directed counterparts.

Dow filed objections to its interrogatories, and on June 4, 1973 an order was entered upholding Dow's contention that the information sought included the work product of attorneys, and accordingly relieving Dow of the need to answer. Leave was given the Steelworkers to reword and refile the interrogatories. Subsequent negotiations between the parties failed to produce a version acceptable to the plaintiffs, although Dow did answer an amended version of Dow interrogatory number 7.

There are at least three versions of the Dow interrogatories: original, amended and proposed. The Chamber interrogatories are apparently unchanged from the original version, although both sets of interrogatories are now preceded by a preamble and definitions which significantly narrow the scope of the inquiry. The Steelworkers move to compel answers to the Chamber interrogatories and the proposed version of the Dow interrogatories.

THE CHAMBER INTERROGATORIES

Chamber interrogatory number 1 asks for a list of Chamber members who are subject to the Michigan Employment Security Act (M.E.S.A.), 12 M.S.A. § 17.501 et seq. Number 2 asks which of these have had strikes since January 1 of 1968, and numbers 3 through 6 request in-

formation concerning any such strikes (dates, participants, terms, resolution, unemployment benefits paid to strikers, etc.). Although the Chamber has indicated its willingness to provide information on employers generally who have been struck or have had their accounts charged for payment of unemployment benefits to striking workers, it objects strenuously to any disclosure of its membership.

The Chamber's contention that because it is the effect of the availability of unemployment benefits on all strikes that is in issue in this case, the distinction between member and non-member employers is irrelevant, and therefore the Chamber's membership list is also irrelevant, is inconsistent with the allegations appearing on the face of the complaint. The Chamber sues not on behalf of all employers subject to M.E.S.A., but only on behalf of its member-employers subject to M.E.S.A. Complaint ¶¶ I, III(2).

Although there is language in the complaint at various points which is broader in scope than that which refers only to Dow and the Chamber's member-employers, it is clear that much is claimed for or about these member-employers which is not claimed for or about employers generally. The effects of M.E.S.A. upon member-employers of the Chamber, their constitutional rights to be free of such effects, and the relief appropriate to remedy any infringement thereon are all issues which the Chamber, as a co-plaintiff, has itself interjected into this action. It cannot now be heard to say that information as to the identity of these allegedly aggrieved member-employers is not relevant to this litigation. *Cf. Schwartz* v. *Broadcast Music, Inc.*, 16 F.R.D. 31 (S.D.N.Y. 1954).

The Chamber also claims a constitutional privilege against disclosure on behalf of its member-employers. It contends that the first and fourteenth amendment rights to freedom of association, as applied in *NAACP* v. *Ala-*

bama, 357 U.S. 449 (1958), and *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960), would be seriously impaired by disclosure of its membership lists, and that this outweighs any need to obtain the information for purposes of this lawsuit.

Assuming the availability of the first amendment protections to the Chamber's members, the facts of this case nevertheless do not warrant its invocation to deny defendant-intervenor the information it seeks. Whether the first amendment protects an organization against disclosure of its membership lists must be decided by balancing the degree to which the right of association will be abridged with the interest in disclosure, and "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling". *Bates* v. *City of Little Rock, supra,* 361 U.S. at 524. Conversely, however, where encroachment upon liberty is minimal, the interest asserted in disclosure need be far less compelling in order to overcome the interests of the group in free association.[1]

It is elementary that a party must as a matter of course have the right to inquire into the factual bases of allegations contained in the opponent's pleadings. *See, e.g., Hughes* v. *Groves,* 47 F.R.D. 52, 57 (W.D. Mo. 1969); *Lance, Inc.* v. *Ginsburg,* 32 F.R.D. 51, 52 (E.D. Pa. 1962). Such inquiries are by definition relevant to issues raised in the case. There can be no viable claim of oppressiveness, for having pleaded certain facts, it may be assumed that the pleader is in a position to furnish the details upon which he relied in making the allegation. *RCA Mfg. Co.* v. *Decca Records, Inc.,* 1 F.R.D. 433, 435 (S.D.N.Y.

[1] In both *NAACP* and *Bates, supra,* the dangers of disclosure of membership lists was clearly documented. In this case the Chamber has presented nothing but the bare assertion that economic or other pressures may be applied to its members. Having failed to document as required by *NAACP* and *Bates,* any reasonable interest in disclosure will overcome the speculative harm.

1940). And even assuming that the facts in question may be covered by an assertable privilege, which in this case they are not, it is only just to conclude that by pleading at bar as to matters involving those particular facts, the party so pleading has chosen to forego its privilege in favor of proving those allegations as part of its case. Because it would be fundamentally unfair to permit a party to withhold information relevant to allegations which it has itself made and the issues thereby raised, the party must choose between its allegations and its privilege. *See Awtry* v. *United States,* 27 F.R.D. 399, 402-03 (S.D.N.Y. 1961); *Independent Productions Corp.* v. *Loew's, Inc.,* 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958).

There is, therefore, no legitimate reason for denying defendant-intervenor the information requested in Chamber interrogatories 1 through 6, and they must be answered. In view of the Chamber's obvious misgivings, however, it will not constitute an unfair burden on defendants if the membership list is placed under a protective order specifying that it may not be used for purposes unconnected with this case, especially since the Steelworkers previously indicated their willingness to abide by such an order.

Chamber interrogatories 7, 8, 10 and 11 request information concerning the Chamber's efforts in opposition to the payment of unemployment compensation to striking employees during the past ten years, including the title and recipient of materials distributed by the Chamber and details of all programs or procedures undertaken in that cause. They must be answered.

The Chamber's objections to the relevancy of these inquiries are without merit. These interrogatories are limited to programs and communications concerning the subject matter of this suit—payment of unemployment compensation to striking employees.[2]

[2] Felix A. Thillet, Inc. v. Kelly-Springfield Tire Co., 41 F.R.D. 55, 57-58 (D. Puerto Rico 1966); Fed. R. Civ. P. 26(b)(1).

Interrogatory number 12 asks whether, in connection with any of the Chamber's programs to combat welfare to strikers, money has been paid to four named individuals and the North American Newspaper Alliance. Certainly the information sought would be highly relevant for impeachment purposes should any of these persons or representatives of the Alliance be called as witnesses. It must be answered.

Finally, as to number 9, both sides agree that the problem is entirely one of timing. The question seeks a listing of all communications received by the Chamber during the past ten years "from any individual now serving as a Justice of the Supreme Court of the United States", concerning "the achievement of the Chamber's legislative, social policy or litigation objectives".

Despite the Steelworkers' contention that "the losing party will certainly seek review in the Supreme Court of the United States", there are too many unresolved variables between here and there to conclude that there is a reasonable probability of this information ever becoming relevant. Number 9 therefore need not be answered unless and until its relevance is more clearly established. Should this case eventually reach the Supreme Court, an answer would be required.

Dow Interrogatories

Dow interrogatories numbers 1, 3 and 5 ask for the identity of any "survey, statistical study, or other document" in Dow's possession "relating to" the effect of unemployment compensation payments to strikers on stiffening of bargaining demands, calling of strikes, and the continuation of strikes. Numbers 2, 4 and 6 ask for detailed identification of all Michigan cases in which Dow contends that higher bargaining demands were made or strikes were called or prolonged as a result of the availability of unemployment compensation to strikers, and any survey, statistical study, or other document which

supports those allegations. Number 7, which Dow has answered but the Chamber has not, asks for identification of any "statistical comparisons or studies" of the length and cost of strikes as between those states which do and those which do not grant unemployment benefits to strikers. Number 8 asks for identification of any "transcripts of interviews or any other documents regarding the effect on strikes or settlements of the actual or expected receipt of unemployment benefits in Michigan". Numbers 9 and 10 ask for identification of any "empirical study or other document" concerning long term impact of benefit payments of industry pricing and competitiveness, and its short term impact on consumer demand. They also seek to determine who will be called as expert witnesses on these subjects.

Dow claims initially that this court's prior ruling on the original Dow interrogatories has become the law of the case and is binding as to the propriety of interrogatories presently before the court. *See generally* 1B J. Moore, Federal Practice ¶ 0.404[1] (2d ed. 1974). However, because the proposed version of these interrogatories is materially different from the originals, the issues to be decided are distinct and the doctrine does not apply. *See, e.g., Salvoni* v. *Pilson,* 181 F.2d 615, 619 (D.C. Cir.), *cert. denied,* 339 U.S. 981 (1950). In addition, because the prior ruling expressly reserved to the Steelworkers the opportunity to reword and refile the interrogatories, that reservation is controlling and requires fresh consideration of the revised version. *See, e.g., De Pinto* v. *Landoe,* 441 F.2d 297, 299 (9th Cir. 1969); *Cataphote Corp.* v. *Hudson,* 422 F.2d 1290, 1296 (5th Cir. 1970). In any event, "the 'law of the case' is only a discretionary rule of practice". *United States* v. *United States Smelting, Refining & Mining Co.,* 339 U.S. 186, 199 (1950).

Dow next contends that interrogatories 1, 3, 5, 8, 9 and 10 are violative of the work product rule. *See* Fed. R. Civ. P. 26(b)(3); *Hickman* v. *Taylor,* 329 U.S. 495

(1947). Insofar as this objection goes to the nature of the information requested, it has been mooted by the definition of "describe" which now precedes the interrogatories. Whereas the original version may have inappropriately sought virtual production of these documents under Rule 33 by requesting detailed recitations of their contents, it is now evident that only information necessary to identify the documents in a request for production under Rule 34 (author or originator, addressee(s), date, title or subject matter, and custodian) is being sought.

> "The Rule [26] authorizes inquiry as to the existence and location of statements obtained from witnesses and memoranda and reports of experts and attorneys. Any objection that such documents are shielded from discovery by privilege, or by the work product doctrine, must be saved until production of the documents is sought or questions are put regarding the contents of the documents. Similarly the requirement of good cause for production of trial preparation materials can be raised only after production is sought." 4 J. Moore, Federal Practice ¶ 26.58 at 26-216-17 (2d ed. 1974).[3]

Dow interposes a similar objection to all of the interrogatories based on Rule 26(b)(4), claiming that the questions seek discovery of "facts known and opinions held by experts . . . acquired or developed in anticipation of litigation", which are not limited as required in subsection (b)(4). The same distinction between identity

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[3] *See* Ballard v. Allegheny Airlines, Inc., 54 F.R.D. 67, 69 (E.D. Pa. 1972); La Rocca v. State Farm Mut. Auto. Ins. Co., 47 F.R.D. 278, 282 (W.D. Pa. 1969); United States v. Glaxo Group Ltd., 302 F.Supp. 1, 17 (D.D.C. 1969), *rev'd on other grounds*, 410 U.S. 52 (1973); Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524, 527 (M.D.N.C. 1967); McCall v. Overseas Tankship Corp., 16 F.R.D. 467 (S.D.N.Y. 1954); Harvey v. Eimco Corp., 28 F.R.D. 380, 381 (E.D. Pa. 1961); C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2023 at 194 (1970).

and contents of documents applies here and requires adherence to the strictures of 26(b)(4) only when the substance of those materials is sought.

The other leg of Dow's work product argument concerns the necessity for Dow's attorneys to sift through their files to determine the materials in their possession "relating to" the various subjects about which the Steelworkers inquire. This, they claim, requires them to formulate and reveal their theories as to what evidence supports their allegations, and that this is undiscoverable work product.

Finally, Dow claims that the information sought in numbers 2, 4 and 6 is in large part equally available to the Steelworkers, and it would therefore be unduly burdensome to require it to compile all the information requested. Dow does not object to identifying those strikes which it contends have been affected by unemployment compensation payments to strikers, but only to compiling the details requested concerning them. Having considered these objections, the court rules that the interrogatories to Dow must be answered.

Attorney Fees

The court declines to dispose of the matter of assessing attorney fees at this juncture. This will await the outcome of this litigation. The court notes that there is an insufficient basis to award fees to either side. There may well have been merit in both positions. Having said that, the court notes that counsel will be well advised to observe Judge Murrah's admonition that this cause is now business in which the public is interested. This is no longer a private dispute and, in any event, it is not a brawl.

Counsel for the intervenor defendant, United Steelworkers of America, AFL-CIO-CLC, is requested to present an appropriate order.

/s/ JOHN FEIKENS
John Feikens
United States District Judge

DATED: Detroit, Michigan
June 27, 1974

(Caption omitted in printing)

Memorandum Opinion Denying Motion for Reconsideration

Plaintiff Chamber of Commerce has filed a motion requesting the court to reconsider its Memorandum Opinion of June 27, 1974 requiring that the Chamber answer certain interrogatories.

Plaintiff Dow Chemical Company has notified the court it fully intends to comply and will answer the interrogatories.

The motion is denied.

The basic concern of the Chamber relates to disclosure of its membership list. Its main arguments again relate to speculative fears of future harm to its members and itself from disclosure. These fears are largely premised on public dissemination of the list.

This court has entered a strong protective order which restricts disclosure of the list to counsel in this case and to the parties only as is necessary to aid in counsel's preparation in this case. This order will protect the list from public disclosure. The court is ready to back up its order fully.

This court has a high regard for the integrity of the attorneys and their awareness of their duties as officers of this court. It will not presume its order will be violated.

The remaining contentions are without merit.

Accordingly, the motion for reconsideration is denied.

An appropriate order may be submitted.

/s/ JOHN FEIKENS
John Feikens
United States District Judge

DATED: Detroit, Michigan
October 29, 1974

(Caption omitted in printing)

Motion to Amend Order to Include Statement Under 28 U.S.C. § 1292(b)

Plaintiff Chamber of Commerce of the United States of America ("Chamber"), by its attorneys, hereby moves the Court to amend its Order of October 8, 1974 in the captioned action to include the statement prescribed by 28 U.S.C. § 1292(b) so that the Chamber may seek an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. In support whereof, the following is shown:

I. Statement of Facts

1. The Chamber is a plaintiff in the captioned action, which action involves the question of whether the Michigan Employment Security Commission may lawfully provide benefits to striking employees.

2. On July 9, 1973, the Intervenors in this suit, the United Steelworkers of America, AFL-CIO-CLC ("Steelworkers"), served upon the Chamber a set of interrogatories directing the Chamber to identify those of its members who are subject to the Michigan Employment Security Act ("MESA") and further directing the Chamber to (1) identify those of its members whose employees were engaged in a strike during the period of January 1, 1968 to April 1, 1973 (Interrogatories 2, 3, 4, 5 and 6); (2) provide information concerning strikes and strike settlements within the State of Michigan (Interrogatories 14, 16 and 18); and (3) identify various studies and documents which the Chamber might have in its possession (Interrogatories 13, 15, 17, 19, 20, 21 and 22). Because the Chamber had no knowledge or documents relating to the subjects of those interrogatories, the Chamber was unable to provide any information responsive to those interrogatories. Having no such information in its possession, the Chamber took the position that the identity of

its members, standing alone, could be of no relevance to the issues of this case or value to the Steelworkers in the prepaartion of their defense of this action.

3. On October 8, 1974, this Court ordered the Chamber to, *inter alia,* identify to the Steelworkers those of its members subject to MESA. On October 18, 1974, the Chamber moved the Court for reconsideration of its Order. The Court denied reconsideration on October 29, 1974.

4. Disclosure of the Chamber's membership may result in infringement of the First Amendment rights of the Chamber's members. Moreover, at this stage of the proceedings in the district court, disclosure of the membership list may result in extensive, time-consuming and costly discovery by the Intervenors which, in view of the controlling questions of law involved, may be unnecessary and improper. The allowance of an immediate appeal from this Court's October 8, 1974 Order would materially advance the ultimate termination of the litigation by cutting short any improper discovery and would protect the Chamber and its members from irreparable injury.

II. Questions of Law

5. The controlling questions of law as to which there is substantial ground for difference of opinion are:

A. Whether, in view of the Supreme Court's opinion in *Super Tire Engineering Co.* v. *McCorkle,* —— U.S. ——, 40 L.Ed. 1 (1974)[1], the identity of Chamber members who are subject to the Michigan Employment Security Act is of any possible relevance to the issues of this case?

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[1] In *Super Tire,* the Supreme Court noted that:
"the availability of state . . . assistance for striking workers . . . pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract." 40 L.Ed. at 9.

B. Whether, where the Intervenors have failed to show the relevance of or a compelling need for such information and the Chamber has demonstrated the irreparable harm which it and its members would be caused, the Court should order disclosure of the identity of Chamber members who are subject to the Michigan Employment Security Act? See *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 816 (1960); *American Civil Liberties Union* v. *Jennings,* 366 F.Supp. 1041 (D.D.C. 1973), appeal pending, *sub nom Staats* v. *ACLU,* (Sup. Ct. No. 73-1413); and *United States* v. *National Committee for Impeachment,* 469 F.2d 1135 (D.C.Cir. 1972).

C. Whether, in the circumstances of this case, it violates the constitutional right of the Chamber's members to freedom of association to disclose the identity of Chamber members who are subject to the Michigan Employment Security Act? See *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 816 (1960); *American Civil Liberties Union* v. *Jennings,* 366 F.Supp. 1041 (D.C.C. 1973), appeal pending, *sub nom Staats* v. *ACLU,* (Sup. Ct. No. 73-1413); and *United States* v. *National Committee for Impeachment,* 469 F.2d 1135 (D.D.Cir. 1972).

6. The conflict between the Court's Order of October 8, 1974 and the authorities cited above, in the Chamber's Motion for Reconsideration and its supporting memoranda demonstrate that a substantial basis exists for a difference of opinion on the legal questions involved, and that such legal questions will control and determine the course of the litigation herein. Appellate resolution of these questions would provide needed guidance and would materially advance the termination of the litigation.

WHEREFORE, the Chamber requests that the Court amend its Order of October 8, 1974, by including in the Order a finding that there is involved a controlling question of law

as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation; and, further, that disclosure of the Chamber's membership list be stayed pending the appeal.

Respectfully submitted,

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November 4, 1974

(Certificate of Service Omitted in Printing)

Docket Entries

Date—1974; Proceedings.

Oct. 18—129. Motion by Chamber of Commerce of the United States of America for reconsid. that part of its order of Oct 8/74 which compels the chamber to disclose the list of the chamber's members who are subject to the Michigan Employment Security Act, certificate of service. BA

Oct. 21—130. Certificate of service.

Oct. 23—131. Proof of service.

Oct. 29—132. Memorandum opinion denying motion for reconsideration, filed and entered.

Nov. 4—134. Notice of appeal of the Chamber of Commerce of the United States of Amer. for stay pending appellate review, certificate of service. BA

Nov. 4—134.— Notice of appeal of the Chamber of Commerce of the United States of Amer.

Nov. 4—135. Letter directed to attorney re: appeal.

Nov. 4—136. Proof of mailing.

Nov. 4—137. Motion of the Chamber of Commerce of the United States of America to amend order to include statement under 28 U.S.C. 1292(b) and certificate of service. (points and authorities attached)

Nov. 5—____. Pre-trial had

Nov. 6—138. Order that the plaintiff's motion for stay pending appellate review and that the portion of the court's October 8, 1974 order directing the Chamber to disclose its membership list to the intervenors is hereby stayed until completion of appellate review, filed and entered.

Nov. 6—139. Order denying motion to amend order to include statement under 28 USC 1292(d), filed and entered.

Nov. 12—140. Certificate of service.

Nov. 13—141. Answers of Chamber of Commerce of the United States of America to interrogatories, certificate of service and affidavits (2).

Nov. 14—142. Stipulation and order that the time to respond to interrogatories served upon it, Dow Chemical Company, by defendant-intervenors, United Steelworkers of America is extended from Nov 7/74 to and through Dec 9/74, filed and entered. (dated Nov 12/74)

Nov. 14—143. Notice of final conference set for April 14/75.

Nov. 25—144. Order of CCA granting plaintiff-appellant's motion for stay pending appeal.

Dec. 9—145. Stipulation and order that the time within which plaintiff is required to respond to interrogatories served upon it by defendant-intervenor, United Steelworkers of America is hereby extended from Dec 9/74 to and through Dec 23/74, filed and entered.

(Caption omitted in printing)

Notice of Appeal

Notice is hereby given that the Chamber of Commerce of the United States of America, plaintiff in the captioned action, hereby appeals from that portion of the Order entered by this Court in this action on October 8, 1974, which ordered the Chamber to disclose to the Intervenors United Steelworkers of America, AFL-CIO-CLC, a list of the Chamber's members who are subject to the Michigan Employment Security Act.

November 4, 1974

(Certificate of Service omitted in printing)

Supreme Court, U. S.
FILED
OCT 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-485

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO•CLC, Respondent,
and
THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-485

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO•CLC, Respondent,

and

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent the United Steelworkers of America, AFL-CIO • CLC (hereinafter "Steelworkers Union"), respectfully asks that the Petition For A Writ of Certiorari which is pending in the above captioned case be denied forthwith because the order which underlies this Petition is a pre-trial order compelling discovery and the pendency of this Petition materially disrupts the progress of the case towards trial in the District Court.

OPINIONS BELOW

There is no official report of the District Court's Opinions (Pet. App. 34a-43a) and the Opinion of the Court of Appeals (Pet. App. 1a-6a) is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the "collateral order" exception to the final judgment rule should be extended to create an immediate appeal of right for any party who is ordered to answer interrogatories during the pre-trial stages of that party's own lawsuit which is pending in a federal district court?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Constitution of the United States, of the Judicial Code, and of the Federal Rules of Civil Procedure are set forth in the Petition at pp. 2-4. However the most pertinent provision of all was omitted, Rule 26(b)(1) of the Federal Rules of Civil Procedure which reads as follows:

> "(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

STATEMENT

On July 25, 1972, the litigation which underlies this Petition was commenced by the Chamber of Commerce of the United States of America (hereinafter "Chamber") and The Dow Chemical Company (hereinafter "Dow") as co-plaintiffs against various officials of the Michigan Employment Security Commission (MESC) as defendants (Pet. App. 11a-21a). The Complaint alleges a violation of the Supremacy Clause of the Constitution of the United States and seeks declarative and injunctive relief against the continuation by MESC of Michigan's policy of paying unemployment compensation to all workers who are voluntarily unemployed from *bona fide* employment without regard to fact that workers so unemployed may also be striking employees of another previous employer (Pet. App. 17a). The Steelworkers Union intervened to protect the interests of its members who were in the midst of conducting a lawful strike against Dow.

The allegations of the Complaint were couched in the terms of the elements of the "macrocosmic test"[1] —first articulated as the standard governing Supremacy Clause challenges to the payment of welfare benefits to striking workers in *I.T.T.* v. *Minter* 435 F.2d 989 (1st

1. Consonant with the third element of the "macrocosmic test" that strikes are prolonged by the availability of unemployment compensation, the Complaint alleges:

> "The striking employees have continued to reject Dow's various offers of strike settlement as a direct result, upon information and belief, of their knowledge that unemployment benefits have been provided to them, and expectation that such benefits will continue to be provided to them, by Defendants." (Pet. App. 16a).

Cir. 1970) *cert. denied,* 402 U. S. 933 (1971) and later held to govern such unemployment compensation challenges in *Grinnell* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U. S. 858, 879 (1973). Under the "macrocosmic test" as articulated in *Grinnell,* a factual inquiry must be made into whether the receipt of unemployment benefits by strikers or the expectation of such receipt results in: (1) workers stiffening bargaining demands beyond that which they would have demanded absent the availability of such benefits; (2) workers striking when absent such availability they would have settled without a strike; and, (3) strikes continuing for longer periods of time and resulting in higher settlements than would have resulted without such availability. 475 F.2d at 458. In their brief filed in opposition to dismissal motions, the Chamber and Dow interpreted their own Complaint as alleging that the challenged Michigan policy has had the effect of prolonging strikes and/or necessitating higher wage settlements to end strikes, and they further stated that they would present "empirical evidence" at trial substantiating these allegations.[2] Taking the allegations of the Complaint as proven, the District Court overruled the motions to dismiss but not without placing the mandate upon the parties to proceed expeditiously with the discovery necessary to prepare the case for trial. *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105, 108 (E.D. Mich. 1972).

2. The representations set forth above are contained at page 8 of the "Memorandum in Opposition To Motions to Dismiss" which the Chamber and Dow jointly filed in the District Court in 1972 and which was part of the record on appeal.

Three years have since elapsed, and the proceedings in the District Court are still in the pre-trial discovery stage. The progress towards trial came to a standstill when the Chamber began its efforts a year ago to obtain pre-sanction appellate review of the District Court's order compelling it to answer the following interrogatory:

> "1. List the name, principal office address and Michigan address of each 'underlying' member business firm of the Chamber . . . who is now or who at any time since January 1, 1968 has been an employer subject to the Michigan Employment Security Act, 12 M.S.A. § 17.501 *et seq.* (hereafter 'MESA')." (Pet. App. 23a).

The challenged interrogatory was one of a set of twenty-two interrogatories which the Steelworkers Union served upon the Chamber on April 28, 1973 (Pet. App. 33a). The Chamber and Dow had repeatedly argued that the "macrocosmic test" defined the scope of the issues discoverable in this litigation,[3] and Interrogatories 13 through 22 of that set require the Chamber to document in detail its position with regard to each element of the macrocosmic test (Pet. App. 28a-33a). In the joint Complaint, the Chamber had also alleged that its "member-employers . . . are also suffering and

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3. For instance, in a discovery brief which Dow and the Chamber jointly filed with the District Court in 1973, contentions identical to the elements of the macrocosmic test were set forth as defining the issues to which the documents they sought to have produced were relevant (Opp. App. 2a). Moreover, Dow and the Chamber relied directly upon the then "recent decision" in *Grinnell* as supporting their motion to produce, and a copy of the *Grinnell* decision was appended to that brief (Opp. App. 2a n.1).

will continue to suffer irreparable injury . . ." as a result of the challenged Michigan policy (Pet. App. 16a), and Interrogatories 2 through 6 require the Chamber to document in detail that injury (Pet. App. 24a-26a). As expected, the Chamber's response to all of these interrogatories was evasive and incomplete.[4] Therefore, obtaining the membership list requested in Interrogatory No. 1 became essential[5] because only by approaching the Chamber's members directly would the Steelworkers Union be able to obtain information about the injury, alleged in the Complaint, that these employers had suffered in strike and *non-strike*[6] situations as a result of the challenged state policy.

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4. With regard to the injury allegedly suffered by its member-employers, the Chamber responded that it has "no studies or information concerning its members in this respect." (Opp. App. 7a). With regard to the complete and detailed identification requested of those strikes upon which the Chamber would rely to prove the elements of the "macrocosmic test," the Chamber simply made a general reference to any strikes mentioned in the prior depositions and affidavits which were already on file in the litigation (Opp. App. 7a-8a). There are enumerable strikes mentioned in those materials, and the Steelworkers Union still does not know upon which of those strikes the Chamber will rely at trial.

5. Had the Chamber answered all the interrogatories, except for Interrogatory No. 1, in full and complete detail, the Steelworkers Union would not have been able to press its request for the membership list.

6. It must always be remembered that under the *Grinnell* "macrocosmic test," the experience of the Chamber's members as Michigan employers in non-strike situations is also highly relevant. 475 F.2d at 458. The Chamber itself emphasizes the importance of non-strike situations when it claims that it has "alleged and will seek to prove" that the Supremacy Clause is violated because the availability of unemployment compensation

On June 27, 1974, the District Court filed its Memorandum Opinion granting almost all of the relief which the Steelworkers Union had sought in its November 20, 1973 motion to compel. With regard to the Chamber's claim that disclosure of the membership list would violate the First Amendment associational rights of its members, the Memorandum Opinion explicitly noted the complete lack of an evidentiary showing by the Chamber that any harm would come to the Chamber's members upon disclosure (Pet. App. 36a n.1). On October 8, 1974, the District Court entered its order compelling discovery and also entered a strong protective order, similar to that originally proposed by the Steelworkers Union, prohibiting public disclosure of the membership list (Pet. App. 8a, 37a). Thereafter, the Chamber filed a motion for reconsideration with supporting affidavits. The District Court denied the motion for reconsideration on the grounds that the Chamber had shown no more than "speculative fears of future harm" that were "largely premised on public dissemination of the list,"—dissemination which was already forbidden by the entry of the "strong protective order." (Pet. App. 43a).

The Chamber filed a timely appeal on November 4, 1974, but it was not until some four months later that the Chamber, apparently as an afterthought, requested in the concluding section of its appellate brief that a writ of mandamus be issued (Pet. App. 6a). The Court of Appeals dismissed the appeal and denied the petition for a writ (Pet. App. 6a). The Chamber filed a timely

---

to strikers in Michigan causes employees to reject collective bargaining offers made by employers "consequently *increasing settlements* and/or prolonging strikes." (Opp. App. 2a) (emphasis added).

petition for rehearing and suggestion for rehearing en banc. No judge in regular active service on the Court of Appeals requested that a vote be taken on the suggestion, and the Chamber's petition for rehearing was denied on August 21, 1975 (Pet. App. 10a). The Court of Appeals has stayed the issuance of its mandate pending this Court's resolution of this Petition.

ARGUMENT

The basic issue in this Petition is an extremely narrow one—whether there is under the particular facts of this case any reason why a party plaintiff should be accorded an immediate appeal of right or accorded appellate review via mandamus of a pre-trial discovery order compelling it to answer an interrogatory seeking information which has been judicially determined to be relevant and non-privileged.

Of course, the Chamber argues that great constitutional issues are involved and that the Court of Appeals adheres to an archaic view of its appellate and mandamus jurisdiction which is impermissibly insensitive to the need for immediate review of great issues such as this case presents. Nothing could be farther from reality; for as we show herein, an examination of the prior decisions of the Court of Appeals establishes that the truly extraordinary cases or those cases involving significant hardship are accorded immediate review. The fact of the matter is that the Chamber failed to prove its case in the District Court and failed to show any hardship involved in the denial to it of immediate appellate review. Moreover, these evidentiary shortcomings are fatal to any attempt to portray this decision dismissing the Chamber's appeal as one which creates a conflict between circuits or as one which involves a burning issue of the day.

It is important to note that the Chamber also sought immediate appellate review before the First Circuit of an order compelling it to answer an almost identical interrogatory in *Grinnell,* and review by appeal and mandamus was similarly denied. *Grinnell Corporation* v. *Hackett,* 519 F.2d 595 (1975). A petition for a writ of

certiorari, No. 75-484, is also pending before this Court with regard to that decision, and the Argument which follows is made in opposition to granting a writ of certiorari in both this case, No. 75-485 and in *Grinnell,* No. 75-484.

I. The Decision Below Is Clearly Correct.

The Chamber's Petition presents the very narrow issue of the correctness of the denial by the Court of Appeals of immediate appellate review of this interlocutory discovery order. It does not present for review the merits of the District Court's discovery order, and it certainly does not present for review the substantive merits of the underlying unemployment compensation—Supremacy Clause litigation.

Before turning to the question of appellate jurisdiction, it is important to recognize the narrow but solid foundation upon which the District Court bottomed its discovery order. After nearly a year of litigation concerning the disclosure issue, the District Court concluded that the information sought by Interrogatory No. 1 was both relevant and non-privileged and was therefore discoverable under the provisions of Rule 26(b)(1) of the Federal Rules of Civil Procedure (Pet. App. 35a, 36a-37a).

With respect to relevance, the District Court noted the repeated claims made in the joint complaint about the alleged injury, even alleged irreparable injury, which the Chamber's members had sustained and would sustain as a result of the challenged state policy (Pet. App.

35a).[7] The District Court concluded that Interrogatory No. 1 which was directed towards discovering the factual basis for these allegations made in the joint complaint was "by definition relevant to the issues raised in the case." (Pet. App. 35a, 36a).

With regard to the Chamber's claim that disclosure of the membership list would violate the First Amendment associational rights of its members, the District Court applied the balancing test announced by this Court in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449 (1958). Under that test, a district court is required to make a factual determination of the "likelihood of substantial restraint" upon associational rights if disclosure of a membership list were to be required and then to delicately balance the proven harm against the public interest in the fair administration of justice through full disclosure of all

7. For example, the Complaint alleges:

"Dow, and similarly situated member-employers of the Chamber, are also suffering . . . irreparable injury . . . ." (Pet. App. 16a, Complaint V.10);

"Unless enjoined, said unemployment benefits will continue to constitute a substantial alternate source of income for a substantial number of the striking employees who presently are engaged in . . . a strike against member-employers of the Chamber." (Pet. App. 16a, Complaint, V.9);

"The payment by Defendants of unemployment benefits to the striking employees . . . deprives Dow and said member-employers of the right to free collective bargaining without state interference. . . ." (Pet. App. 17a, Complaint VI.1); and

"The payment . . . indirectly, but not insubstantially, requires Dow and said members to finance through their contributions to the Commission strikes against themselves to their irreparable injury . . . ." (Pet. App. 17a, Complaint VI.1).

relevant facts in pre-trial discovery. 357 U. S. at 462, 464-465. The District Court made an initial factual finding that the "Chamber has presented nothing but the bare assertion" that its members will be harmed by disclosure (Pet. App. 36a n.1). When the Chamber subsequently did come forward with affidavits depicting confrontations that had occurred between Chamber members and *other* unions, the District Court concluded that the Chamber had presented nothing more than "speculative fears of future harm" that "are largely premised on public dissemination of the list." (Pet. App. 43a). The District Court concluded that there was no substantial threat of harm because he found that the "strong" protective order previously entered "will protect the list from public disclosure." (Pet. App. 43a). These factual determinations are fatal to the Chamber's claim of constitutional privilege, and those findings cannot be overturned on appeal unless clearly erroneous. Fed. R. Civ. P. 52(a).

In light of the District Court's findings that the list of Chamber's members was non-privileged and relevant, the Court of Appeals quite correctly declined to hold that this discovery order was immediately appealable as of right under the "collateral order" doctrine enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949). To be immediately appealable under *Cohen,* an order must:

> "[F]all in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546.

This discovery order is certainly not separable from the issues in the basic litigation. The propriety of that order turns upon the correctness of the District Court's finding that the membership list is relevant to this litigation—a finding which required the District Court to determine what the issues in this litigation are, or may be, and to determine whether disclosure of the membership list would tend to lead to the revealing of facts related to those issues. Fed. R. Civ. P. 26(b)(1). To review this discovery order, an appellate court would, at the very least, have to determine for itself what the issues are in this case. Therefore, this discovery order cannot be appealable under *Cohen* because an issue ceases to be "collateral" when its resolution can be decided "only by making reference to the substantive litigation . . . ." *Borden Company* v. *Sylk,* 410 F.2d 843, 846 (3d Cir. 1969); *accord, Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 597 (1st Cir. 1975).

Unlike the situation in *Cohen,* this discovery dispute cannot be said to have been "finally determined" because the District Court has yet to determine, in the exercise of its discretion under Fed. R. Civ. P. 37(b), what sanctions should be imposed upon the Chamber if it persists in its non-compliance. Also unlike *Cohen,* a right of immediate review is unimportant here because the strong protective order prevents the occurrence of irreparable injury to the Chamber's members even if appellate review is delayed until the Chamber's right of appeal from a final judgment has matured. 337 U. S. at 546.

Finally, there is a policy consideration which militates against applying *Cohen* to this type of order. Even if the Court of Appeals had accepted and decided the

appeal on its merits, it could not have further settled the law concerning the propriety of pre-trial discovery orders compelling the disclosure of membership lists. The right of the Chamber, as an association, to refuse to answer an interrogatory seeking the identification of its members has already been well established by this Court's decision in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449 (1958). The dispute here is not with the law but with the correctness of the District Court's factual finding that the Chamber failed to meet its evidentiary burden of showing danger to its members from the disclosure of the membership list under the aegis of a protective order. The most that the Court of Appeals could do would be to reverse this factual finding. In each subsequent case the factual determinations will always be different, and hence appealable, and the extension of *Cohen* to this area will, as the Court of Appeals found, simply result in the inundation of appellate dockets (Pet. App. 4a). *Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 597 (1st Cir. 1975); *accord, I.B.M.* v. *United States,* 480 F.2d 293, 298 (2d Cir. 1973) (en banc), *cert. denied,* 416 U. S. 979 (1974).

The fact that this Court's decision in *N.A.A.C.P.* v. *Alabama, supra,* has clearly defined the standard governing the Chamber's claimed constitutional privilege to refuse to answer this type of interrogatory also justifies the refusal by the Court of Appeals to review this discovery order through the issuance of a writ of mandamus (Pet. App. 6a). In the very decision cited by the Chamber, *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964), this Court explained:

> "This is not to say, however, that following the setting of guidelines in this opinion, any future alle-

> gation that the District Court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy." 379 U. S. at 112.

This Court's decision in *N.A.A.C.P.* v. *Alabama, supra,* has laid down all the necessary ground rules with regard to discovery of membership lists, and the Court of Appeals properly declined to issue the writ to review the factual determinations which the District Court made in applying the clearly defined *Alabama* standard. *See, National Right To Work Legal Defense* v. *Richey,* 510 F.2d 1239, 1244 (D.C. Cir. 1975), *cert. denied,* 95 S. Ct. 2631 (1975).

Thus the Court of Appeals was entirely correct as a matter of law in deciding to deny immediate appellate review of this interlocutory discovery order. Indeed, this case illustrates the wisdom of the congressional judgment embodied in 28 U.S.C. § 1291 which established a system of appeals solely from final judgments and rejected the system of piecemeal appeals. This case has been delayed in the pre-trial stage for over a year now because the Chamber has attempted to take just such a piecemeal appeal. A firm trial date of May 27, 1975, had to be vacated because of the pendency of this appeal in the Court of Appeals, and thousands of dollars have already been expended in the processing of this frivolous appeal. The pendency of this Petition only further delays and disrupts the trial process, and the Petition should be denied as soon as practicable.

II. There Is No Conflict of Decision.

The Chamber claims that there is serious division in the circuits with regard to the applicability of the *Cohen* doctrine to interlocutory discovery orders which affect the rights of third parties (Pet. 15-16). No direct conflict in decisions is cited, but the Chamber vaguely suggests that there is a conflict between the decision here and that of the Tenth Circuit in *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993 (1965), *cert. denied,* 380 U. S. 964 (1965). The conflict is non-existent because while *Covey* permits an immediate appeal from a pre-trial discovery order, it did so only because the appellant was a non-party. Here by contrast the Chamber is a party plaintiff, and the Tenth Circuit has itself denied a *Cohen* appeal to a party litigant in *Paramount Film Distributing Corp.* v. *Civic Center Theatre,* 333 F.2d 358, 361-362 (1964). Indeed, the Tenth Circuit relied on this distinction between parties and non-parties when it stated in *Covey*:

> "Our recent decision in Paramount Films Dist. Corp. v. Civic Center Theatre, 10 Cir., 333 F.2d 358, has no application because there the complaints against discovery were made by parties to the litigation." 340 F.2d at 995 n.5.

Thus by its own terms, *Covey* offers no solace to the Chamber and announces no Rule which conflicts with the holding by the Court of Appeals here.

The absence of a conflict is confirmed by the similarity between the principle underlying *Covey* and the principle applied by the Court of Appeals in other cases that an immediate appeal will lie if it represents "the only opportunity which the . . . parties will have to *effec-*

tively review the District Court's order." *Ochsner* v. *Millis,* 382 F.2d 618, 623 (6th Cir. 1967) (Emphasis in the original), *accord, Horizons Titanium Corporation* v. *Norton Company,* 290 F.2d 421 (1st Cir. 1961); *see, Gillespie* v. *United States Steel Corporation,* 321 F.2d 518 (6th Cir. 1963), *modified,* 379 U. S. 148 (1964). In *Covey,* as in *Ochsner,* the person seeking immediate appellate review had "no right of appeal from a judgment therein." 340 F.2d at 996. In both cases, there were no other effective avenues of appeal available such as review through contempt. The appellant in *Ochsner* simply had no order with which to refuse to comply because he had been denied discovery, 382 F.2d at 619, and in *Covey,* review through contempt was held to be inadequate as too great a "hazard of punishment" to be required of non-party witnesses. 340 F.2d at 996.

No such problems are presented here for if the Chamber is to be believed, the secrecy of the list of Chamber members is crucial to the continued existence of the Chamber as a viable association (Pet. 9 n.9). Therefore the officials of this party plaintiff can be expected to willingly risk contempt to avoid disclosure just as the officials of the N.A.A.C.P. did in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 451 (1958). Moreover, the Chamber, as a party plaintiff, does have a right of appeal from the final judgment in this litigation, and the protective order prevents its members from suffering any harm before that right of appeal matures. Finally, the Chamber may obtain immediate appellate review without disclosing the list of its members by respectfully declining to comply with the District Court's order and having contempt or dismissal imposed under Fed. R. Civ. P. 37(b) as the penalty for its non-compliance. *Hickman* v. *Taylor,* 329 U. S. 495 (1947) (Appeal from criminal

contempt); *United States* v. *Procter & Gamble Co.,* 356 U. S. 677 (1958) (Appeal from dismissal sanction); *See, N.A.A.C.P.* v. *Alabama, supra* (Appeal from civil contempt). All other party litigants must first submit to the sanctions procedure established in Fed. R. Civ. P. 37(b) before any appeal can be taken, and it would be wrong to permit associational parties to bypass that procedure on the grounds that they are a special class of litigants. *Schlagenhauf* v. *Holder,* 379 U. S. 104, 113 (1964).

The refusal to issue a writ of mandamus in this case does not create a conflict in the circuits. The Chamber implies that there is such a conflict by comparing the decisions of the Fourth, Seventh and Eighth Circuits in which pre-trial discovery orders were reviewed by mandamus (Pet. 22 n.17) with the denials of the writ herein and in a decision of the Ninth Circuit to which this Court has granted a writ of certiorari. *Kerr* v. *U. S. District Court,* 95 S. Ct. 1988 (No. 1023, 1974 Term). There is no conflict because neither the Court of Appeals nor the *Kerr* court held that mandamus would never lie to review pre-trial discovery orders. The Court of Appeals went no further than holding that the Chamber "failed to meet its burden of showing extraordinary circumstances which would entitle it to mandamus." (Pet. App. 6a). *Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 599 (1st Cir. 1975). When such a showing of extraordinary circumstances is made, the Court of Appeals does utilize mandamus to grant immediate review of a pretrial discovery order. *United States* v. *U. S. District Court,* 444 F.2d 651, 655-656 (1971), *aff'd,* 407 U. S. 297 (1972); *accord, In Re Union Leader Corporation,* 292 F.2d 381 (1st Cir. 1961), *cert. denied,* 368 U. S. 927 (1961); *Hartley Pen Co.* v. *U. S. District Court,* 287

F.2d 324 (9th Cir. 1961). Thus the decision in this case does not establish a division in the circuits, and the Petition should be denied.

III. There Is No Important Question of Federal Law.

The Chamber attempts to create important federal issues by concentrating on collateral matters which were not necessary to the District Court's decision and which may never become an issue in this litigation. For instance, the Chamber raises a sham issue when it claims that lurking in this case is the supposedly unsettled question of the scope of First Amendment rights which a corporation may exercise (Pet. 10). The District Court did not bottom its order on a rejection of the Chamber's position. Indeed, the District Court never ruled upon the merits of this issue (Pet. 10 n.10). *Compare, Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 598 (1st Cir. 1975). Likewise the correctness of the District Court's waiver holding is not genuinely raised by this Petition as the Chamber argues (Pet. 11). This is so because the waiver holding is no more than an alternate grounds for the decision which is, in any case, solidly premised upon the Chamber's failure to sustain its evidentiary burden of proving that disclosure of the membership list presented any danger whatsoever to its members (Pet. App. 36a n.1).

Through a bit of linguistic legerdemain, the Chamber turns the District Court's rather commonplace relevancy determination into a decision which it claims threatens the very future of all association litigation (Pet. 7-8). In the Petition, the Chamber characterizes the allegations in the joint Complaint concerning injury to its members as directed solely to meeting the standing

requirement enunciated in *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). However, the Chamber went far beyond the standing requirement and repeatedly alleged that its members were suffering particularized injury of the type that would be necessary to sustain the burden of proof under the "macrocosmic test."[8] Moreover, in one of the Prayers for Relief, the Chamber sought injunctive relief which would have benefited not all Michigan employers but only Dow and "the member employers of the Chamber . . . ." (Pet. App. 19a, Complaint VIII. 3). These repeated allegations of particularized injury, led the District Court to conclude that the identity of the members must be disclosed because the Complaint claims "much . . . for or about these member-employers which is not claimed for or about employers generally." (Pet. App. 35a). Alleging the specific injury that is essential to establishing a prima facie case goes far beyond the requirements set forth in *Sierra Club* which could have been met here by simply alleging that the Chamber's members are subject to the Michigan law and that the challenged Michigan policy has an adverse impact on them. 405 U. S. at 734-735. Thus the case presents no threat to the future of associational litigation because it is a unique case in which the association's members also constitute a source of past experience which is highly relevant to the proper disposition of the substantive merits of the case.

Finally, the Chamber invites this Court to utilize this case as a vehicle to establish a procedure which will permit "immediate appeals from discovery orders where disclosure impinges upon constitutional rights . . . ." (Pet. 14). Creating such immediate appeals of

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8. *See,* Argument, *supra* at 12 n.7.

right would be unwise because it would increase the incidence of unnecessary constitutional adjudications which all courts have a duty to avoid. *See, e.g., Communist Party, U.S.A.* v. *Catherwood,* 367 U. S. 389 (1961). Congress has provided a "safety valve" covering just those sort of cases by allowing discretionary appeals of certified issues under 28 U.S.C. §1292(b), but the District Court declined to so certify the disclosure issue in this case (Pet. 7). Moreover, if truly important constitutional issues do arise in the pre-trial context, appellate courts may review these issues through the discretionary issuance of writs of mandamus. *See, e.g., United States* v. *U. S. District Court,* 444 F.2d 651, 654-656 (6th Cir. 1971), *aff'd* 407 U. S. 297 (1972; *Cf. In Re Union Leader Corporation,* 292 F.2d 381 (1st Cir. 1961); *In Re United States,* 348 F.2d 624 (1st Cir. 1965).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE DOW CHEMICAL COMPANY and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Plaintiffs,
and
S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendants,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC, and INTERNATIONAL UNION, UAW,
Intervenors.

MEMORANDUM IN SUPPORT OF MOTION FOR ORDER COMPELLING DEFENDANTS TO PRODUCE CERTAIN DOCUMENTS FOR INSPECTION BY PLAINTIFFS.

On February 27, 1973, Plaintiffs served a request for production upon the Defendant-Intervenors for inspection of certain documents on May 29, 1973, pursuant to Rules 26 and 34 F.R.C.P. The Defendant-Intervenors have objected to the production of items 4, 5, 8 and 9 on the sole ground that those documents fall within the attorney-client privilege. The Defendant-Intervenors have

asserted the privilege, however, without so much as an affidavit to support their claim. This bare claim of privilege by the Defendant-Intervenors is not sufficient, as described below, to exempt these disputed documents from discovery pursuant to Rules 26 and 34, F.R.C.P.

Pursuant to Rule 26(B)(1), F.R.C.P. Plaintiffs need only demonstrate that the disputed documents are relevant, which, of course, does not require that the documents are admissible evidence but only that they are "reasonably calculated to lead to the discovery of admissible evidence." At the threshold, therefore, it is necessary to define the issues.

1. Plaintiffs have alleged and seek to prove that the Commission has contravened federal labor policy and the Supremacy Clause of the Constitution by undermining the core of that policy—collective bargaining. As Plaintiffs have alleged, the Commission's disbursement of substantial subsidies to striking employees, within the meaning of the National Labor Relations Act amended (29 U.S.C. §§ 151 *et seq.*), has two interrelated effects: *first,* the knowledge of, and actual availability of such benefits result in the rejection of collective bargaining offers made by employers which would have otherwise been accepted, consequently increasing settlements and/or prolonging strikes; and *second,* the payment of those subsidies both permits and causes collective bargaining agents to maintain hard bargaining positions while awaiting attrition to compel employer to capitulate.

In *Grinnell Corporation v. Hackett,*[1] a recent decision involving, as here, the payment of unemployment

1. Nos. 72-1275 and 72-1276 (1st Cir. Mar. 15, 1973). A copy of the opinion is attached hereto.

compensation to striking workers, the Court of Appeals For the First Circuit stated what it regarded as the fundamental factual question at issue: "the causal relationship between the receipt of benefits, which unions obviously desire and often actively seek, and longer, costlier strikes . . . ." If such a causal relationship could be established, then according to the Court, the plaintiffs might well have proven their case.

With this objective in mind, therefore, and in order to demonstrate that very causal connection, Plaintiffs have requested the Defendant-Intervenors to turn over for inspection items 4, 5, 8 and 9 which are, Plaintiffs believe, directives to Union locals instructing them how to utilize government subsidies during collective bargaining. Through these various memoranda, Plaintiffs will seek to demonstrate the reliance placed by striking employees and their Union on the availability of public subsidies, and the resultant effect on the collective bargaining process.[2]

2. When a party claims that an otherwise discoverable document is privileged, "[i]t is axiomatic that the claimant of a privileged [attorney-client] has the burden of establishing that he has the right to it." *Jan Danish v. The Guardian Life Ins. Co. of America,* 18 F.R.D. 77 (S.D.N.Y. 1955).[3] Every element of the privilege must be established. *Commercio & Industria Continental, S.A.*

2. A variety of similar documents have been requested and produced without dispute.

3. To the same effect, see *Boushar v. U.S.,* 316 F.2d 451, 456 (8th Cir. 1953); *C. V. Mattson v. Cuyona Co.,* 178 F.Supp. 653, 654 (D. Minn. 1959); *Honeywell, Inc. v. Piper Aircraft Corp.* 50 F.R.D. 117, 120 (M.D. Penn. 1970); *Camco, Inc. v. Danish Oil Tools, Inc.,* 45 F.R.D. 384 (S.D. Texas, 1968).

v. Dresser, 19 F.R.D. 513, 514 (S.D. N.Y. 1956). In the present case, the Defendant-Intervenors, in their Answer for Production of Documents, have made a bare claim to confidentiality. Such an unsupported assertion is entirely insufficient to invoke the privilege.

At the outset, the Defendant-Intervenors were required to prove that the disputed communications constitute "Legal advice . . . from a professional legal adviser in this capacity as such." 8 Wigmore, Evidence, §2290 (McNaughton Rev. 1961). Accordingly, if an attorney was not acting as a legal adviser, such communications are not privileged. *Id.* at 514.[4] In sum the privilege does not arise from a bare claim, as here, that the "sender or receiver of the communication is a lawyer" or that the title of a document contains the word "Legal". *Honeywell, Inc. v. Piper Aircraft Corp., supra,* p. 119. See also, *Boushar v. U.S.,* 316 F.2d 451 (8th Cir. 1953).

3. In the instant case, moreover, it is apparent that the privilege is inapplicable, and production should be promptly ordered. *First,* when dealing with a large organization, the privilege is limited to legal advice given to the "control group" with the power to make policy decisions, and who, accordingly, constitute the client within the purview of the privilege. *Natta v. Hogan,*

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4. E.g., the following communications have been held to fall outside the attorney-client privilege because the attorney was not acting as a legal adviser: *In re Colton,* 201 F.Supp. 13 (S.D. N.Y. 1961), and *Olender v. United States,* 210 F.2d 795 (9th Cir. 1954), where the attorney acted principally as an accountant; or in *Lowy v. Commissioner,* 262 F.2d 809 (2d Cir. 1959), where the attorney acted simply as a scrivener of deeds or simply deposited money in a bank for his client.

392 F.2d 686 (10th Cir. 1968). A contrary interpretation—extending for example, the "control group" to include hundreds of local union agents scattered across the nation—would permit the emasculation of the discovery processes by simply funnelling all directives through the union's General Counsel. Such persons clearly do not "possess the authority to control, or substantially participate in the decisional process," of an international union, as is required to invoke the privilege. *Natta v. Hogan, supra,* p. 692. Instead, the documents here involved are received merely as directives or orders issued, after the decisional process has been completed at the international level, by subordinate officials for implementation. Such documents do not constitute, therefore, "a communication made in the course of seeking legal advice from a professional legal adviser in his capacity as such." *Olender v. United States,* 210 F.2d at 806.

Second, it similarly cannot now be contended that the disputed memoranda, which flowed to hundreds of representatives for consideration with their colleagues at the local union level, were considered confidential. Such documents were intended to be "conveyed to others" and, accordingly, are "not privileged." *U.S. v. Pellier,* 255 F.2d 446, 447 (2nd Cir. 1958); 8 Wigmore §2311. In fact, even assuming *arguendo* that these documents were once privileged while within the control group, that "status [was lost] by subsequently being a broadcast to a large constituency." Pye, *Fundamentals of the Attorney-Client Privilege,* 15 Practical Lawyer 15 (Nov. 1969). Any "cloak of confidence" was simply dissipated. *United States v. Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 464 (E.D. Mich. 1954).

4. In conclusion, Plaintiffs request that the Defendant-Intervenors be compelled to produce the requested documents.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE DOW CHEMICAL COMPANY and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Plaintiffs,
v.
S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendants,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Intervenors.

Case No. 38644

Response to Interrogatories of Intervenor United Steelworkers of America

NOW COMES Plaintiff CHAMBER OF COMMERCE OF THE UNITED STATES ("Chamber") by its attorneys and pursuant to the Federal Rules of Civil Procedure answers the Interrogatories of the UNITED STEELWORKERS OF AMERICA dated April 28, 1973 as follows:

1. In response to Interrogatory #1, Plaintiff Chamber has this date filed with the Court a Motion for Re-Hearing concerning the subject matter thereof.

2. In response to Interrogatory numbered 2, the Chamber has no information except as has been set forth in the depositions previously taken in this cause and at which Intervenor UNITED STEELWORKERS OF AMERICA was present. There is no formal report regarding the receipt of unemployment compensation benefits to strikers made by or to the Chamber and the Chamber has no

studies or information concerning its members in this respect. On information and belief, any compiled information, records or data concerning this subject is maintained by the State of Michigan.

3. In response to Interrogatories numbered 3, 14, 16, and 18, the Chamber has no information except that which was given in previous depositions in this cause wherein Intervenor UNITED STEELWORKERS OF AMERICA was present and that contained in the affidavit of Herbert Northrup and study of Armand Thiebolt which is currently on file with the Court and has been served upon the other parties of this action.

4. In response to Interrogatories numbered 4, 5, and 6, the Chamber has no knowledge of any of the information requested therein.

5. In response to Interrogatories numbered 13, 15, 17, 19, 21, and 22, the Chamber has no knowledge of any of the information requested therein except that which is contained in the affidavit of Herbert Northrup and study of Armand Thiebolt.

6. In response to Interrogatory numbered 20, the answer of the Chamber is "no".

7. In response to Interrogatories numbered 7, 8, 10, 11, and 12 will be provided within the time period provided by the Court.

LEVIN, LEVIN, GARVETT & DILL
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October 18, 1974.

STATE OF MICHIGAN
COUNTY OF WAYNE } ss

I, ROBERT J. FINKEL, being duly sworn, state that I am local counsel for Plaintiff Chamber of Commerce of the United States and that upon information and belief the above and foregoing answers are true.

ROBERT J. FINKEL

Subscribed and Sworn to before me
this 18th day of October, 1974

.....

Notary Public, Macomb County, Mich
My Commission Expires: 11-13-76
(Acting in and for Wayne County)

Supreme Court, U. S.
FILED
DEC 1 1975
MICHAEL RODAK, JR., CLERK

No. 75-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

and

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITIONER'S REPLY TO APPELLEE-INTERVENORS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

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THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITIONER'S REPLY TO APPELLEE-INTERVENORS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

THE DECISIONS OF THE COURTS BELOW REQUIRE ASSOCIATIONS AND THEIR MEMBERS TO ABANDON ONE OF TWO RIGHTS PROTECTED BY THE FIRST AMENDMENT: THE RIGHT TO ASSOCIATE AND REMAIN ANONYMOUS OR THE RIGHT TO ADVANCE COMMON VIEWS THROUGH LITIGATION.

The United Steelworkers of America ("the Union") contends in its opposition to the Chamber's Petition for Certiorari that by alleging injury to its Michigan members the Chamber has perforce made the identity

of each of these members relevant in this matter. This untenable assertion brings into focus the central question now before the Court: whether membership associations can be required, consistent with the constitutionally protected right of freedom of association, to disclose the identity of their members, where only the necessity to establish standing requires a pleading that members suffered injury because of a defendant's conduct.

The Chamber pleaded the injury of its members to obtain standing to bring this action as an association representing its members. The Court has recently reaffirmed the principle first articulated in *Sierra*[1] that to obtain standing to initiate litigation on behalf of its members an association is required to allege "that its members, or anyone of them" are suffering injury (which the Chamber did plead). *Warth* v. *Seldin*, — U.S. —, 95 S. Ct. 2197, 2213 (1975). Standing is not and has not been contested in this case, and accordingly, while it is necessary to plead injury to one or more members, disclosure of the members' identity will not aid in resolving this or—as will be seen—any other issues in this litigation.

The constitutional right of freedom of association comprehends (1) the right of association members to remain anonymous, and (2) the right of association members to advance commonly held views by initiating litigation. See cases cited on page 8 of Petitioner's opening brief; T. Emerson, *The System of Freedom of Expression* 432 (New York, 1970) ("... associational expression should be entitled to the same complete protection as individual expression."); B. Schwartz, Vol. 1 *Rights of the Person*, 367 (New York, 1968). If

[1] *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

associations are required to disclose the identity of their members when they plead injury to these members solely to obtain standing, associations and their members are placed in the dilemma of choosing to forego one of two constitutionally protected rights. Association members will hereafter be required to choose between abandoning their right of anonymity and disclosing their identities in order that their representative can establish standing to advance their common views in litigation or abandoning their right to further their common goal through litigation.[2] This Hobson's choice should not be imposed upon associations or their members, and accordingly, review is essential to correct the erroneous rulings of the courts below.

II.

THE IDENTITY OF THE CHAMBER'S MEMBERS IS IRRELEVANT TO ANY ASPECT OF THIS PROCEEDING; WHERE A PARTY IS ABLE TO ELICIT ALL OF THE INFORMATION IT NEEDS FROM OTHER SOURCES, AS THE UNION IS ABLE TO DO HERE, DISCOVERY SHOULD BE PRECLUDED, PARTICULARLY WHERE, AS HERE, DISCLOSURE THROUGH DISCOVERY WILL CAUSE SUBSTANTIAL HARM TO OTHER PARTIES IN THE CAUSE.

The Union's contention that the identity of the Chamber's members is relevant to its defense misconceives the concept of relevancy. Rule 401 of the

[2] Whether courts hold that by alleging injury to members to obtain standing an association either makes the members' identity "relevant" or that members waive their right of anonymity when they support an association type action, the result is the same. Associations and members will be required to abandon one of two rights protected by the First Amendment: the right to associate and remain anonymous or the right to advance common views through litigation.

Rules of Evidence for the United States Courts defines "relevancy" as a relationship between a proffered item of evidence and a "fact that is of consequence to the determination of the action." Whether a fact is of consequence is determined by the substantive law governing the proceeding rather than the rules of evidence. 1 Weinstein's Evidence ¶ 401[03] (1975).

In the underlying litigation, the names of the Chamber's Michigan members do not constitute items of evidence which have a relationship with a consequential fact to the resolution of this cause. The Court in *Super Tire Engin. Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974) established the standard to be applied in cases such as the instant one:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly has ruled out such assistance in its calculus of law regulating labor-management disputes.

To establish the conflict between state payments to strikers and federal labor policy, the inquiry is now limited to an examination of the Congressional commentaries to ascertain if that body "explicitly or implicitly has ruled out [state assistance to strikers]." It is specifically unnecessary to elicit proof that any employer or group of employers has been injured by state benefit payments. *Super Tire* rendered all employers fungible; the injury to each and all employers in a state such as Michigan where unemployment compensation benefits are paid to strikers is conclusively

presumed. Since Congressional intent remains the only consequential fact in this case, and since the identity of the Chamber's members has no relationship to this fact, the identity of these members is not relevant to this cause.[3]

Even under the *Grinnell*[4] standard now superceded by *Super Tire, supra,* there is no basis for such discovery. Consistent with the definition of relevancy set forth above, the material or significant facts include: the fact that Michigan pays unemployment compensation benefits to strikers; the fact that strikes are longer and costlier in Michigan than they are in similar industries in states not granting these benefits; and facts relating to state interest in cushioning the impact of unemployment. Evidence related to these facts include, for example, the length and cost of strikes in Michigan and the length and cost of strikes in similar industries in states that do not pay unemployment compensation to strikers. Other relevant evidence may include expert testimony that demonstrates the impact of benefits on strikes or that establishes the state's interest in paying these benefits. All statistical evidence is readily obtainable from state agencies.

Nor is this discovery essential to the Union's defense.

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[3] The Complaint in this case was drafted before the *Super Tire* decision. Even assuming *arguendo* that before *Super Tire* proof of injury to a particular employer was necessary to sustain this Complaint, *Super Tire* has obviated the necessity of this proof. The Union, therefore, cannot now, in view of *Super Tire,* rely on the pre-*Super Tire* pleadings in this cause which allege injury and successfully contend that because of this pleading, the identity of the Chamber's members is now relevant.

[4] *Grinnell Corp.* v. *Hachett,* 475 F.2d 404 (1st Cir.), cert. denied, 414 U.S. 859 (1973).

Michigan's records furnish the Union with all of the information it needs to refute the Chamber's contentions or to establish its own. These records show, *inter alia,* the identity of employers who were struck, the date the strike began, the date the strike ended and the number of employees idled by the strike. Utilizing this list, the Union may call any or all of the listed employers to the witness stand in an effort to demonstrate that they were not injured because the payment of state unemployment compensation benefits to strikers. Michigan also maintains a list of all employers subject to unemployment compensation, and this list may be utilized by the Union for deposition purposes in non-strike situations.

Where, as here, discovery will cause substantial harm to the Chamber and its members and will produce no relevant evidence, it should not be permitted. Indeed, by permitting discovery, the courts below transgressed the standard of *NAACP* v. *Alabama,* 357 U.S. 449 (1958). As Professor Cox has noted, discovery of the identity of an association's members will be permitted only (1) if this identity is essential to the determination of the case, *and* (2) if the harm resulting from disclosure of the identity of members is slight. A. Cox, *The Warren Court,* 103 (Cambridge, 1969). Here, the first of these conjunctive tests has not been satisfied, since there has been no showing that the identity of the Chamber's members is an item of evidence bearing a relationship to any fact necessary as a matter of law to determine this action. Accordingly, the courts below have misapplied the *NAACP* standard, and this misapplication should be corrected by this Court.

CONCLUSION

Where a party is able to elicit all of the information it needs from other sources, as the Union is able to do here, discovery should be precluded, particularly where, as here, disclosure through discovery will cause substantial harm to other parties in the cause. It is this rule which the Chambers requests the Court to enunciate in order to forestall future attempts at discovery in similar association litigation.

Respectfully submitted,

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